

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SEVENTH REGION**

**FRENCHTOWN ACQUISITION COMPANY, INC.
d/b/a FOUNTAIN VIEW OF MONROE**

Employer-Petitioner

and

Case 7-UC-628

**COUNCIL 25, AMERICAN FEDERATION OF STATE,
COUNTY AND MUNICIPAL EMPLOYEES (AFSCME),
AFL-CIO, AND THEIR AFFILIATED LOCAL 1548**

Incumbent Union

APPEARANCES:

Grant T. Pecor, Esq., of Grand Rapids, Michigan, for the Employer-Petitioner
Richard G. Mack, Jr., Esq., of Detroit, Michigan, for the Incumbent Union

DECISION AND ORDER

Upon a petition filed under Section 9(b) of the National Labor Relations Act, a hearing was held before a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the undersigned.

Upon the entire record¹ in this proceeding, the undersigned finds:

1. The hearing officer's rulings are free from prejudicial error and are affirmed. With respect to the procedural and preliminary motions still undecided at the close of the hearing, and the parties' objections to adverse rulings renewed in their briefs, my reasoning and rulings are as follows:

¹ Both parties filed briefs, which were carefully considered. On September 1, 2009, the Acting Regional Director denied the Employer's August 27, 2009, request to strike all or portions of the Union's brief.

Union's Objections to Certain Evidentiary Rulings

Union Exhibit 4

The Union sought to introduce a letter dated April 29, 2009,² in which the Employer's counsel made a bargaining proposal to the Union ostensibly to resolve the status of the charge nurses at issue here. The Union contends, in essence, that the Employer's letter discloses bad-faith motivation and a fatal indecisiveness of position in regard to the instant petition. The hearing officer rejected the proffered exhibit on relevance grounds. I agree.

The central question in this proceeding is whether the Employer's charge nurses are statutory supervisors. This issue will be decided based on an analysis of how charge nurses work and interact with other employees, not on evidence as to the Employer's putative motive for raising the issue. An employer's motive can be relevant to, and litigable in, certain representation cases, as the Board held in *All County Electric Co.*, 332 NLRB 863 (2000). But the instant Employer's motive for filing is not germane here, especially where the timeliness of its petition is undisputed, as discussed more fully below. Under these circumstances, it was appropriate to exclude the letter, and thereby avoid the general proscription against invading the General Counsel's authority to litigate unfair labor practice issues. See *Texas Meat Packers*, 130 NLRB 279 (1961).

Union Exhibit 5

For the purpose of showing witness Janette Reau's asserted bias against the Union and toward the Employer, the Union offered a letter dated November 24, 2008, in which she resigned from the Union. The hearing officer rejected the exhibit, correctly noting that evidence of bias is not relevant in this case, under the general rule that factual findings in unit clarification proceedings are based on the weight of the evidence, not witness credibility.

The role of a hearing officer in a unit clarification proceeding, as in a pre-election hearing, is merely to gather information, not to resolve credibility issues or make recommendations. *S. Frederick Sansone Co.*, 127 NLRB 1301, 1302 n.4 (1960); see *NLRB v. ARA Services, Inc.*, 717 F.2d 57, 64 (3rd Cir. 1983). Accordingly, the notice of hearing in this matter directed the hearing officer simply to take testimony. (B Exh. 1-i) Section 102.63(b) of the Board's Rules and Regulations provides that unit clarification hearings be conducted in accordance with Section 102.64 through 102.68 of the Board's Rules. Section 102.66(e) bars the hearing officer from making any recommendations, a

² All dates hereafter are 2009, unless noted.

proscription, derived from Section 9(c)(1)(B) of the Act, that prevents a hearing officer from reporting impressions of credibility based on witness demeanor.

The same provisions do not explicitly forbid a regional director to make credibility resolutions, but there is no basis for doing so in either a pre-election or unit clarification proceeding, because the regional director has not personally seen the witness testify, and may not receive a credibility recommendation from the hearing officer who has. See **Reeves Brothers, Inc.**, 277 NLRB 1568, 1578 (1986), dismissed as moot 851 F.2d 356 (4th Cir. 1988) (unpublished). Reau's letter is not indicative of bias as a matter of law. Therefore, the letter is irrelevant, and was properly rejected.

The Union also takes issue with the hearing officer's alleged refusal to place the letter in the official rejected exhibit file. A close reading of the colloquy reveals that, although the hearing officer discouraged the Union from eliciting evidence of Union sympathies from subsequent witnesses, she did not expressly ban the November 24, 2008, letter from the rejected exhibit file. (Tr. 1191) Union Exhibit 5 is, in fact, part of the rejected exhibit file, where it will remain.

Prohibiting Inquiry Into Alleged Pay Discrimination

The hearing officer properly disallowed an exploration, sought by the Union, into whether the Employer discriminatorily compensated only favorable witnesses for time spent at the instant hearing. The subject raises an unfair labor practice issue, which is not relevant to, and may not be litigated in, this proceeding. **Milwaukee Independent Meat Packers Association**, 223 NLRB 922, 923 (1976); **Texas Meat Packers**, *supra*.

Union's Request for Adverse Inferences

On June 4, the Union served a subpoena duces tecum on the Employer, demanding production, inter alia, of:

2. Copies of all documents reflecting standards and/or rules for provision of services by Nursing Employees, created during the years 2008-2009.
4. Copies of all documents or memoranda reflecting internal or external guidelines, policies, and laws that govern Nursing Employees and their work performance (including but not limited to training requirements, certification requirements, staffing levels, patient care, administration of medicine, etc.) in effect for the years 2008-2009.

6. Copies of all documents outlining the expectations of [sic] Nursing Employees regarding patient care, and protocol regarding patient care, in effect for the years 2008-2009.

(Subpoena Record, B Exh. 2, internal exhibit 1)

At the hearing and in its brief, the Union argued that the Employer did not make a good-faith effort to comply with the Union's subpoenas, as shown by the following: (i) the Employer limited the Union's access to subpoenaed documents, by means described below, and (ii) from time to time during the lengthy hearing, records that the Union says were reasonably encompassed by its subpoenas, and therefore should have been produced at the start, emerged only serendipitously, often as proffered Employer exhibits. On these bases, the Union asks for two adverse inferences: (1) that the Employer failed to produce all of the records encompassed by the quoted portions of the June 4 subpoena; and (2) that such documents, if produced, would establish the "specifically controlled, and routine, nature of the tasks involved" in the job duties of aides. (U Brief, p. 104)

The Employer permitted Union counsel to review subpoenaed records during the hearing, as well as before and after each day's proceedings, but only in the hearing room and only in the presence of an Employer agent. Contrary to the hearing officer's explicit instruction, the Employer would not allow the Union to inspect the subpoenaed material away from the hearing room or outside the presence of an Employer agent, and refused to copy the material to facilitate such access. The Employer filed a special appeal of the hearing officer's order, but conditionally withdrew the appeal as moot when the hearing closed without initiation of subpoena enforcement proceedings.

The public interest is best advanced by a degree of cooperation that, regrettably, was absent here. Further, I do not subscribe to the Employer's narrow interpretation of its production obligations to non-Board parties under the Act and the Board's Rules and Regulations. However, I decline to draw the adverse inferences urged by the Union. The Employer furnished voluminous rules, practices, and protocols, most, if not all, of which are in the record. As to the first sought inference, I am uncertain that more such material would have been uncovered as a result of greater due diligence on the part of the Employer. Regarding an inference as to the circumscribed and routine nature of certain tasks, the record is sufficiently developed to allow a finding based on direct evidence, as discussed in detail below, without need for resort to inferential conclusions.

Employer's Motion to Amend its Petition

On June 23, the first day of the hearing, the Employer orally sought to amend its petition to exclude not only charge nurses, but also afternoon, midnight, and house supervisors from the unit. The hearing officer did not rule whether to allow the

amendment, but advised the parties that they may adduce evidence on the issues raised by it. (Tr. 13-15)

No prejudice can attach to allowing the amendment, because the parties were expressly given leave to develop the record. The Employer's motion to amend is granted.

The Employer's original petition sought to exclude the afternoon and midnight supervisor classifications on the ground that they are statutory supervisors. By its amendment, it asserts that they should be removed for the additional, or alternative, reason that the jobs have been unfilled for an unspecified but substantial period of time, and will assertedly not be filled in the future. Citing *Coca Cola Bottling of Wisconsin*, 310 NLRB 844 (1993), the Employer argues that the classifications are now permanently empty and, therefore, must be excluded.

The Employer misconstrues *Coca Cola Bottling of Wisconsin*. The case does not hold that empty classifications must be removed through the unit clarification process, but, to the contrary, that unit clarification is a vehicle for deciding only "actual, existing" unit placement issues involving "employees actually working." *Id.* If a classification is vacant, and there is no evidence that it will be filled, the Board refrains from rendering a unit placement ruling. *Bishop Randall Hospital*, 217 NLRB 1129, 1132 n.13 (1975); *Trans World Airlines, Inc.*, 211 NLRB 733, 734 (1974). Under this authority, I may not decide the fate of the vacant afternoon and midnight supervisor positions in this proceeding.

The Employer's original petition asked that house supervisors be excluded under Section 2(11) of the Act. The amendment cites the additional, or alternative, ground that house supervisor "is not a classification by itself" but rather "an administrative designation given on a rotating basis to charge nurses assigned certain extra administrative responsibilities." (E Brief, p. 1 n.2) I agree with the Employer that the house supervisor designation "is primarily an administrative and/or clerical obligation that does not carry with it more authority than would ordinarily be possessed by a Charge Nurse" and that "an individual designated 'house supervisor' still maintains [her] duties and responsibilities as a Charge Nurse when [she serves] as 'house supervisor.'" (E Brief, p. 6) For that reason, I will not make a separate ruling with regard to house supervisor, but will consider that function in my analysis of the charge nurses' status.

For the foregoing reasons, the amended petition is dismissed, but only as to afternoon, midnight, and house supervisors. The unit placement of charge nurses remains at issue, and is decided as set forth below.

Sua Sponte Correction of Transcript

The phrase “Michelle Fish” is replaced with “and shellfish” at Tr. 710, line 19. The phrase “Aspen unit” is replaced with “AFSCME unit” at Tr. 1184, line 13.

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction.

3. The labor organization involved claims to represent certain employees of the Employer.

Bargaining History

On January 14, 2003, in Case 7-RC-22366, I found the Employer’s charge nurses to be statutory employees. After the resulting election, the Union was certified as the collective-bargaining representative of all registered nurses (RNs) and licensed practical nurses (LPNs), including charge nurses, afternoon and midnight supervisors, and house supervisors. The parties entered into a labor agreement effective September 2004 through September 2007. Whether the contract was extended is not disclosed in the record, but the parties stipulated that it expired before the Employer filed the petition in this case on June 8, 2009.

Procedural Issues – Appropriateness and Timeliness of Petition

The Employer seeks a determination that its charge nurses are statutory supervisors and, therefore, must be excluded from the unit. It filed the petition after its collective-bargaining agreement covering charge nurses expired. There is no claim that the classification of charge nurse is new, or has undergone recent changes in duties, function, or authority. The 2003 decision regarding their status issued after the Supreme Court’s opinion in *NLRB v. Kentucky River Community Care*, 532 U.S. 706 (2001), but before the Board’s holdings in *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006); *Croft Metals, Inc.*, 348 NLRB 717 (2006); and *Golden Crest Healthcare Center*, 348 NLRB 727 (2006).

Ordinarily, unit clarification petitions are limited to deciding the unit placement of new, or recently and substantially changed, positions. However, where a petitioner establishes a statutory basis for an exclusion, such as supervisory status under Section 2(11), unit clarification is appropriate even absent evidence that the contested position is new or recently modified. *Goddard Riverside Community Center*, 351 NLRB 1234, 1235-1236 (2007); *Bethlehem Steel Corp.*, 329 NLRB 243, 244 n.5 (1999); *Washington Post Co.*, 254 NLRB 168, 169 (1981). The instant petition is appropriate even though the position of charge nurse is neither new nor changed.

Even when statutory policy prompts a unit clarification petition, as it does here, the Board will nonetheless require the petition to be filed at an “appropriate time,” so as to minimize any disruption to a collective-bargaining relationship. *Goddard Riverside Community Center*, *supra* at 1236; *Sunoco, Inc.*, 347 NLRB 421, 422 (2006); *Wallace-Murray Corp.*, 192 NLRB 1090 (1971). Here, the Employer’s petition was filed during contractual hiatus, virtually always an appropriate time to file, absent exceptions not applicable here.

Accordingly, and in the absence of a claim from either party that the instant petition is untimely, I find that the petition is procedurally proper and warrants a substantive ruling on the status of charge nurses.

Summary of Decision on Merits of Petition

The Employer asserts that charge nurses have authority, within the meaning of Section 2(11) of the Act, to discipline, assign, reward, responsibly direct, and transfer employees, to adjust their grievances, and to make effective recommendations in those areas as well as in hiring, suspension, promotion, and discharge. The Employer also contends that charge nurses have authority to evaluate employees, a function not explicitly recited in Section 2(11)’s definition of the term supervisor. The Union disputes that charge nurses possess any such authority. Upon carefully reviewing the record, which includes the testimony of 29 witnesses and scores of exhibits, introduced during a 13-day hearing, as well as the parties’ briefs, I find that the Employer has not met its burden to prove that its charge nurses are statutory supervisors.

The *Oakwood* trilogy of Board decisions did not alter the requirement, endorsed by the U. S. Supreme Court, that the party that alleges an individual is a supervisor carries the burden of proof. *NLRB v. Kentucky River Community Care*, *supra* at 711-712; *Elmhurst Extended Care Facilities, Inc.*, 329 NLRB 535, 536 n.8 (1999) (lack of evidence is construed against party asserting supervisory status). The burden is met only by fulfilling a preponderance evidentiary standard. *Oakwood*, *supra* at 694; *Dean & Deluca*, 338 NLRB 1046, 1047 (2003). It bears repeating that a finding of supervisory status has the profound consequence of extinguishing the individual’s rights under the Act. *Chevron Shipping Co.*, 317 NLRB 379, 381 (1995). That finding here would wrest union representation from an entire existing bargaining unit. This is not to suggest that the stakes in this case heighten the burden of proof for the Employer, but merely that assiduous attention must be paid here, as always, to whether the burden is satisfied.

The Act demands only the possession of Section 2(11) authority, not its exercise, but the evidence must still be persuasive that such authority exists. *Avante at Wilson, Inc.*, 348 NLRB 1056, 1057 (2006). If it does, the trier of fact scrutinizes whether exercise of the authority requires the use of independent judgment.

A party shouldering the burden of proof on these points must heed the Board's long-standing warning that purely conclusionary evidence is not sufficient to establish supervisory status. *Golden Crest Healthcare Center*, *supra*, at 731; *Chevron Shipping Co.*, *supra* at 381 n.6 (conclusionary statements without supporting evidence are not enough); *Sears Roebuck & Co.*, 304 NLRB 193 (1991) (same). There is little probative value in eliciting testimony that parrots labor law terms of art, or supplies glib "sound bites" for a post-hearing brief. While broad pronouncements and generalizations may be material, they are not substitutes for details. Further, evidence in conflict or otherwise inconclusive will not be grounds for a supervisory finding. *New York University Medical Center*, 324 NLRB 887, 908 (1997), *enfd.* in relevant part 156 F.3d 405 (2nd Cir. 1998); *The Door*, 297 NLRB 601 n.5 (1990); *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989).

This record contains an insufficient quantum of proof to meet the Employer's burden. For the reasons set forth below, I find that the Employer has failed to show that charge nurses either (i) discipline, reward, promote, hire, suspend, discharge, or evaluate employees, or adjust their grievances; (ii) make effective recommendations in those areas; (iii) assign, direct, or transfer employees using independent judgment; or (iv) responsibly direct with the requisite accountability for the actions of those directed.

Overview of Operations

About October 2007, the Employer relocated to a new building in Monroe, Michigan, and changed the facility's name from Maplewood Manor to Fountain View of Monroe. The new location houses 119 beds, down from 150, which are still arranged in four distinct units, but now on a single floor. The Employer continues to provide round-the-clock nursing care to long-term and rehabilitating patients.

At the time of the hearing, the charge nurse bargaining unit consisted of 43 nurses – 40 LPNs and 3 RNs. The Employer has no nurses below the rank of charge nurse. They work with 45 certified nurse aides, who are represented in collective bargaining by the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO, (UAW), in a unit with other service and maintenance employees. Immediately over the charge nurses are clinical coordinators, sometimes called unit managers, Nicole Nutt and Jennifer Greening, and Minimum Data Set (MDS) Coordinators Carol Tocco and Christina Vanderlaan. Next in the ascending hierarchy, on an equal plane, are Assistant Director of Nursing (ADON) Priscilla "Jill" Kontry and PM Manager Deborah Austermiller, who both report directly to Director of Nursing (DON) JoAnn Maddux, who answers to Facility Administrator Glen Lowery. The parties stipulated, and I find, that all of the named individuals are supervisors under the Act, by their authority to hire, fire, discipline, or responsibly direct employees.

Many of the managers, including Administrator Lowery, DON Maddux, ADON Kontry, and PM Manager Austermiller, arrived since May 2008. The current PM manager and clinical coordinator positions were created after the 2003 decision issued. The PM manager has absorbed some of the duties previously performed by the afternoon and midnight supervisors, positions that were abolished after 2003, as were the jobs of staff development coordinator, restorative care coordinator, and infection control nurse also referenced in the 2003 decision.

DON Maddux superintends the overall nursing care in the four patient wings, known as Pleasant View, a 29-bed long-term nursing unit; Pleasant View Heights, a 16-bed locked dementia unit; Meadow View, a 43-bed mixed skilled and long-term nursing unit; and Evergreen, a 30-bed skilled nursing unit.³ Clinical Coordinator Greening oversees Pleasant View and Pleasant View Heights, Clinical Coordinator Nutt supervises Meadow View, and ADON Kontry is the unit manager of Evergreen.

The DON, ADON, MDS coordinators, PM manager, and clinical coordinators comprise the nursing management team. The Employer does not consider charge nurses part of that team. (Tr. 37) Daily “stand-up” meetings take place among the nursing managers just listed, as well as those from other departments. Charge nurses do not participate in those meetings. (Tr. 61-63)

When the patient units are at full census, they are staffed by nurses and aides as follows:

	<u>Days / Afternoons</u>	<u>Nights</u>
Pleasant View	2 nurses – 2 or 3 aides	1 nurse – 2 aides
Pleasant View Heights	1 nurse – 2 aides	1 nurse – 1 aide
Meadow View	3 nurses – 4 aides	2 nurses – 2 aides
Evergreen	2 nurses – 2 or 3 aides	2 nurses – 2 aides

Charge nurses are assigned three 12-hour shifts per week, either 7:00 a.m. to 7:00 p.m., or 7:00 p.m. to 7:00 a.m. Aides work in 8-hour shifts, either 7:00 a.m. to 3:00 p.m., 3:00 p.m. to 11:00 p.m., or 11:00 p.m. to 7:00 a.m. Most of the undisputed nurse managers work days – DON Maddux, weekdays from 9:00 a.m. to 5:00 p.m.; Clinical Coordinators Nutt and Greening, four shifts per week from about 6:30 a.m. to 5:00 p.m., with rotated days off so one or the other is at the facility daily; and ADON Kontry, an undisclosed number of shifts per week, from about 8:00 a.m. or 9:00 a.m. PM Manager Austermiller is the facility’s highest night-time supervisor, and is empowered to set her

³ This accounting of beds totals 118, contrary to the 119 bed count above. The record does not resolve this one bed discrepancy, nor where this discrepancy lies. The numbers were provided by DON Maddux (Tr. 27, 214).

own hours. (Tr. 91) Typically, she works four days per week, usually from about 7:00 p.m. to 5:00 a.m. or 6:00 a.m.

Whether the charge nurse works days or nights, she is accompanied in the building for 84% or more of her shift by at least one nurse manager. The only times that no nurse supervisor higher than a charge nurse is on site are during the spaces between the shifts of the day-shift supervisors and PM Manager Austermiller, roughly 30 to 90 minutes in the early morning, and 1 to 2 hours in the early evening. During those gap periods, and at all other times that ADON Kontry and Clinical Coordinators Nutt and Greening are away from the site, they are on call to answer telephoned questions from their respective units. (Tr. 1069)

In addition, PM Manager Austermiller, ADON Kontry, Clinical Coordinators Nutt and Greening, and MDS Coordinators Tocco and Vanderlaan take turns sharing on-call duty every weekend from Friday evening to Monday morning. (Tr. 1793) An on-call nurse manager receives an average of 12 calls per weekend, many from the charge nurse serving as house supervisor, asking how to deal with a staff coverage problem. (Tr. 1793) There are no set instructions for when a charge nurse must contact the on-call manager. Nurse Janette Reau testified that she has never encountered an emergency and therefore never had occasion to call. (Tr. 1150) Nurse Elizabeth O'Rourke made one call, not to the on-call nurse manager, but to the on-call maintenance manager to deal with a plumbing problem. (Tr. 1373)

Charge nurses never substitute for clinical coordinators or other nurse managers, nor do they serve on-call duty. (Tr. 761)

Assignments

Scheduling Aides' Units, Shifts, and Work Days

Charge nurses and aides alike receive their work schedules from an individual known in the record only as the scheduler, after approval by the DON. (Tr. 570) Though not identified by name, nor the subject of a stipulation, it is patent and undisputed that the scheduler is not a charge nurse. The scheduler promulgates unit assignments, and days on and off, in a master schedule that issues every six weeks. A document known as the "24 Hour Staffing Sheet" or daily sheet, naming each day's nurses and aides by unit and shift, also emanates from the scheduler. (Tr. 374-375; E. Exhs. 86 and 87, the 24 Hour Staffing Sheets for the period December 1, 2008, through May 31, 2009)

The Employer concedes that the DON and scheduler determine aide staffing levels. In fact, an Employer directive dated August 6, 2002, forbids "nurse supervisors" from adding to budgeted staff without prior clearance by the DON or an on-call manager. (U. Exh. 26)

Nonetheless, the Employer asserts that when the workload is heavy, charge nurses may recommend adding aides beyond those scheduled. The DON testified that charge nurses made such recommendations effectively on two occasions. (Tr. 217-219) Her account, however, was not based on personal knowledge of the colloquies between the charge nurses and their clinical coordinator on the subject. It was also uncorroborated, in that of the four individuals said to be involved, two were not called as witnesses (charge nurses Peggy Shockey and Nicole Thompson), and two testified but were not asked about the matter (charge nurse Denise Lisek and Clinical Coordinator Jennifer Greening). As a result, the record does not contain probative evidence of what charge nurses may have said to influence upper management's decisions to add staff on either occasion.

DON Maddux testified that charge nurses may have input concerning an aide's unit placement, but the instances she cited involved transfers, discussed below, not initial assignments.

Releasing Scheduled Aides Due to Low Patient Census

Determining whether patient census is low enough to warrant reducing staffing levels is normally the province of the scheduler, clinical coordinator, or PM manager. (Tr. 204) If such a decision is made, the scheduler specifies on the daily sheet the number of aides, from which units, are to be sent home. (Tr. 690) DON Maddux testified that on the weekend, when the PM manager is not present, charge nurses may unilaterally decide whether to send aides home. (Tr. 204) The record contains no corroboration for this assertion, and no examples of any charge nurse making this determination.

Once the scheduler determines the number to release, the charge nurse picks which one or ones to send home by first looking for volunteers, who signal their interest by signing the margins of the daily sheet. If more than one aide has enlisted, the charge nurse sends home the volunteer with greatest seniority, in accordance with Article XII, §14, of the UAW labor agreement. If more aides must be excused than have volunteered, the charge nurse sends aides home in inverse seniority order, as mandated by Article XII, §15, of the UAW contract. (J Exh. 5) The DON concurred that selecting which aide to release early is governed by the seniority provisions of the UAW contract. (Tr. 203-204)

The DON stated that a charge nurse may recommend retaining an aide, despite the send-home instructions on the daily sheet. The only example given was unattributed hearsay that shed no light on what role, if any, the charge nurse played. (Tr. 764-767)

Covering Aides' Absences

Which nurse arranges to fill the hole created by a missing aide depends on when the absence is discovered. Many calls to secure substitutes are made by the PM manager or clinical coordinator. If neither is on site when the discovery occurs, the charge nurse designated as that day's "house supervisor" makes the calls.

All charge nurses are eligible to serve as house supervisor, and about 75 percent have done so at least once. (Tr. 307) The record suggests, however, that, for unexplained reasons, the duty falls to certain charge nurses more frequently than to others. The house supervisor performs her duties in late afternoon and early evening, after day-shift nursing supervisors have left and before PM Manager Austermiller arrives. (Tr. 653)

As the Employer contends, the function is primarily administrative or clerical in nature. The house supervisor takes no action to secure coverage unless she is either implicitly authorized, by learning that a scheduled aide is absent, or explicitly authorized by a manager. As nurse Cynthia Swift testified, she would never call in an extra aide on her own without prior permission. (Tr. 1610) The charge nurse begins her search by seeing whether any aides have volunteered for extra shifts by signing the daily sheet. If so, she offers the work to the volunteers in seniority order. If staffing is still light, she telephones aides at home, using lists for this purpose arranged by seniority, and asks if they wish to report. It is undisputed that a charge nurse, even as house supervisor, may only request and not compel an aide's attendance.

If the house supervisor exhausts the seniority call list without finding a volunteer, she contacts the on-call nurse manager for permission to ask on-duty aides to stay. The charge nurse needs permission to begin this inquiry, whether or not it will result in overtime for the aide. With the nurse manager's assent, the house supervisor polls for volunteers in order of high to low seniority.

If no aide volunteers, the UAW contract allows the Employer to mandate overtime of up to four hours. The DON explained that mandated shifts are imposed in inverse seniority order. (Tr. 697-698) The record does not establish whether a charge nurse has ever invoked the labor agreement's overtime mandation provision. The degree of charge nurse involvement, if any, in that process is unknown.

Assigning Overtime to Aides

DON Maddux asserted that charge nurses may independently authorize aides to work overtime, and need not obtain approval first from an on-call manager. (Tr. 41-42) Her assertion was undercut by a management memo dated December 16, 2008, initialed

by DON Maddux herself, stating that all overtime must be pre-approved by either a clinical coordinator or weekend on-call nurse supervisor. (U Exh. 2)

Charge nurses Janette Reau and Corin Greene testified that they have the authority, on their own, to detain aides whose work is unfinished, even if the post-shift work gives rise to overtime liability for the Employer. Neither stated who informed her of the authority, or supplied specifics of its exercise. Greene admitted never using the authority. (Tr. 1144, 1166, 1248-1249)

Three other charge nurses offered contrary evidence. Charlotte Prater stated that she never grants overtime without prior management approval. (Tr. 1530) Holly Cranford testified that she sought and received Clinical Coordinator Greening's permission before allowing an aide to stay for an overtime shift. (Tr. 1726-1727) When Cranford independently approved an informal shift trade between aides that resulted in overtime for one of them, MDS Coordinator Vanderlaan chided her for not first obtaining the on-call manager's approval. (Tr. 1717-1718) Angela Theisen received the same admonition in a like circumstance from Clinical Coordinator Greening. (Tr. 1671)

Assigning Patients and Room Sets to Aides

A charge nurse does not normally configure blocks of rooms to assign to the aides on her unit. Either aides split the rooms into groups on their own (Tr. 58, 1245, 1510, 1511-1512, 1604), or room sets are prefigured in documents that the charge nurse receives and does not prepare, such as a patient "get up" schedule. (U Exh. 6) Since at least 2006, aides on all four units have engaged in the practice of switching room sets every biweekly payday. (Tr. 1507-1508, 1572) Usually the aides themselves mark on the daily assignment sheet the rooms for which they are taking responsibility. (J Exh. 7)

DON Maddux testified that, although aides may divide patient groups on their own, the charge nurse must review the divisions and adjust the assignments if, in her nursing judgment, she deems it necessary. (Tr. 59) Charge nurse Heidi Dozier confirmed that she reviews how her aides fill out the assignment sheet, and makes adjustments once or twice per month. (Tr. 2224, 2226) Her sole example of an adjustment was countermanding her aides' decision to give a group of rooms to a new aide who had not yet completed her orientation period. (Tr. 2219-2220) While Dozier described that solitary decision as a discretionary exercise of her nursing judgment (Tr. 2268), other witnesses maintained it was reflexive. According to charge nurse Heather Ouellette, no Employer policy would have permitted the aide, on the third day of her five-day initial orientation, to be responsible for her own set of patients. (Tr. 2410) Aide Katelyn Bullard testified that Dozier explained on that occasion that she was overruling the assignment due to instructions from Clinical Coordinator Nicole Nutt. (Tr. 1764-1765)

Several witnesses contradicted Dozier and suggested that charge nurses seldom scrutinize or modify aides' room self-assignments. Nurse Cynthia Swift testified that she does not routinely look at the room assignment sheet, and has never objected to how her aides divided the patients in her 10 months of employment. (Tr. 1631, 1633-1634) Nurse Gayle Shaw, with 19 months of service at the time of the hearing, has also never modified her aides' room splits. (Tr. 1586) Nurse Stephanie Ouellette claimed that matching aides to patients is unnecessary, because all trained and certified aides are capable. (Tr. 2097) Aide Katelyn Bullard testified that during her nine-month tenure, a nurse intervened in room assignments only twice – once, when, as noted above, charge nurse Heidi Dozier divested patients from an orientee, and again, when aides were unable to reach consensus among themselves and asked not the charge nurse, but Clinical Coordinator Nicole Nutt, to make the room assignments. (Tr. 1764-1765)

DON Maddux asserted that a charge nurse may deviate from the way rooms are normally allocated, and dedicate an aide to one particular patient, rather than assigning her the usual full set. (Tr. 241) Because there is no evidence that this has occurred, there is no way to determine what factors a charge nurse would consider, and how much discretion she would possess to make such a decision.

Sometimes a patient or his or her family objects to the assigned aide on gender or idiosyncratic grounds. In such cases, the aides themselves often redistribute the patients to accommodate the objector. (Tr. 246, 1245, 1508-1510) Staff routinely follows a patient's gender preference in making shower assignments. (Tr. 1360) Aides also take the initiative to re-divide patient rooms if a bed becomes available. (Tr. 1510)

Responsible Direction

Directing Aides' Tasks

Aides repeatedly perform the same tasks, which are set forth in comprehensive policy and procedures manuals that describe, in several hundred pages, detailed protocols for, and the purpose, equipment, and suggested documentation associated with, scores of treatments, ranging from shaving, showering, and side rails, to denture, nail, and perineal care. (U Exhs. 18-21, 31) The written policies and procedures are reviewed annually by the Employer's quality assurance committee. There is no evidence that charge nurses help formulate them.

Aides use not only detailed instructions telling them how to perform each discrete task, but also written guides advising what to do for which patients. Every patient receives an assessment and 21-day care plan soon after being admitted. From those analyses, MDS coordinators create Resident Assessment Planning Sheets (RAPS), which they update every three months based on doctors' notes and orders. (Tr. 2277-2279) Notebooks known as Activities of Daily Living (ADL) contain separate pages for each

patient, listing standard duties such as bathing, shaving, and nail care, as well as patient-specific information such as emptying colostomy bags or obtaining a weight every shift. Aides initial the entries as they complete them. (Tr. 1751, J Exh. 10) The ADL book, kept by the nurse's station, also contains shower, wheelchair maintenance, "get-up," weight, and meal intake schedules. (U Exhs. 6, 23 - 25; E Exhs. 33, 92) Pre-printed portions of the daily assignment sheet prescribe specific aide duties by shift. (J Exh. 7) An individual resident care guide, updated constantly by charge nurses and the aides themselves, is found in the closet of every patient's room. (Tr. 1267; E Exh. 32, U Exh. 22) Each resident care kardex contains all of the information that a caregiver needs to tend that patient. (Tr. 1979) Aides consult all of this material regularly to learn what to do. (Tr. 1921-1922, 1937-1938, 2012-2013)

PM Manager Austermiller testified that much of the aides' work is routine in nature. (Tr. 845) DON Maddux acknowledged that the documents noted above list tasks that aides standardly perform. (Tr. 747-748) Four aides and at least one charge nurse testified that the written guides, and the regularity of the aides' daily duties, enable aides to know what to do with little instruction. (Tr. 1750-1752, 1755, 1920-1921, 1937-1938, 2011-2013, 2034) The repetitive nature of their work, and the existence of exhaustive compendia prescribing how and when those tasks are to be performed, persuade me that much of what aides do can fairly be described as routine.

As the Employer urges, however, fluctuations in a patient's condition and changes in doctors' orders occur frequently. (Tr. 925) Getting a urine specimen, helping a patient to the toilet, and dressing a patient for a visitor are all standard aide chores, as are many others. But whether and when the aide performs those services on a given day for a particular patient is not wholly predictable. The charge nurse may vary the aide's routine.

To assure that changed circumstances are properly addressed, at the start of the shift a charge nurse may orally update aides on each patient's condition. (Tr. 2014-2015) On some units, incoming aides receive this report from the outgoing aides rather than the charge nurse. (Tr. 2098) Charge nurses also may interrupt aides' activities throughout the shift to delegate tasks. (Tr. 2230-2232) Drying and re-dressing an incontinent patient is perhaps the most common diversion. (Tr. 2231) Nurses may also direct aides to watch patients who are not eating well, or who are at risk of falling. In order to placate a worried colostomy patient, charge nurse Heidi Dozier instructed an aide to check that patient first after each meal. (Tr. 2232)

Some charge nurses testified that their interruptions are requests, not demands. (E.g., Tr. 1959) The asserted distinction may be more tonal than actual, as it is beyond dispute that aides are required, on penalty of discipline, to obey charge nurse directives. Several exhibits show that aides have been disciplined for failing to heed such

instructions. (E.g. E Exhs. 28-31, 57) In one, Clinical Coordinator Nicole Nutt counseled an aide as follows:

The nurses on duty from 3 – 11 are your supervision in the evening. It is their responsibility to ensure your work is completed before your shift ends. It is also under their scope of practice to delegate duties to you. When duties are delegated to you it is your responsibility to complete the duties without disrespecting your nurse supervisor...You need to notify your supervisor whenever you leave the unit for break or lunch.

(E Exh. 57) Some witnesses urged that aides reciprocally pull nurses from tasks at hand. As veteran aide Tiki Morris observed, however, the authority of aides and nurses to direct each other is “Not the same.” (Tr. 2035) Aides are subordinate.

On the other hand, there is conflict in the record about how effectively the Employer has communicated charge nurses’ authority to direct aides. The authority is plainly asserted in the written job description of the charge nurse, described in greater detail below. (E Exhs. 71, 83; J Exh. 3) But charge nurse Holly Cranford, whose four-year tenure ended February 2009, testified that she was never told she had the authority to tell aides what to do. Her relationship with the aides on her units was one of teamwork and mutuality, not hierarchy. (Tr. 1722-1724) Terry Ferguson and Jennifer Jukuri, current charge nurses hired in November 2004 and February 2008, respectively, both said they have not been informed that they may issue orders to aides. (Tr. 1939, 1959) Charlotte Prater and Angela Theisen, charge nurses since October 2006 and July 2008, respectively, testified that they have never been advised they may direct aides. (Tr. 1513, 1669)

The most direct evidence elicited by the Employer regarding factors that nurses consider in re-directing aides came from PM Manager Austermiller and charge nurses Elizabeth O’Rourke and Heidi Dozier. Austermiller said that during her night shifts, if the charge nurse is busy and an aide is unsure of what to do, she will prioritize the aide’s work, taking into consideration his or her experience and skills. She could not think of examples of her own prioritizing, but asserted charge nurses do it as well. (Tr. 779-780) O’Rourke said she applies her “independent judgment” to situations. (Tr. 1326) To illustrate, she said that if an incontinent patient must be changed into dry clothing, she will instruct an aide who is merely distributing water to attend to the task immediately, but tell an aide already dealing with a wet patient to finish that process first, and then attend to the other patient. (Tr. 1327) Dozier explained that, although giving a shower usually requires only one aide, she once assigned a more senior aide to help a new one with a troublesome patient. (Tr. 2225-2226) She decided on this tack because the new

aide earlier confessed to not yet feeling comfortable performing certain tasks on her own. (Tr. 2246-2247)

O'Rourke's and Dozier's testimony just noted supplies the only specific examples of a charge nurse's directions devolving from her evaluating competing patient emergencies, or deciding to deviate from protocol. The many other examples of purported direction – reminding aides to answer a call light, empty a colostomy bag, help a patient to the dining room – show that nurses know what must be done to care for their patients, but not how they analyze rival patient needs or tailor tasks to aides' skill levels.

Monitoring and Correcting Work

Charge nurses provide hands-on nursing care to their patients (Tr. 187), and, while doing so, may observe the quality of the aides' work. If the nurse notices that the work is substandard, she will normally speak to the aide and, if she deems it warranted, also issue a written counseling on a form entitled "One on One In-Service." Although the parties disagree on whether an in-service constitutes discipline, as discussed below, there is little dispute that it is an educational tool designed to improve the aide's performance. Some subjects of in-services issued by charge nurses to aides include: checking on patients before taking a work break (E Exh. 21), positioning patients properly (E Exhs. 26, 72), obeying a nurse's direction (E Exh. 28), timely attending to an incontinent patient's needs (E Exhs. 37, 56), properly offering meals and reporting anorexia to the nurse (E Exh. 42), completing showers (E Exh. 62), disposing of refuse (E Exhs. 63, 64, 73), respecting patient rights (E Exh. 65), and reporting to the charge nurse before leaving the floor for a break (E Exh. 74).

Whether a charge nurse must correct aides by means of in-services is unclear. There is no guideline establishing when an in-service is appropriate. (Tr. 1129) Since charge nurse Charlotte Prater started almost three years ago, no one in management has mentioned in-services to her, and she has never issued one. (Tr. 1536) Charge nurse Gayle Shaw has never issued one either. (Tr. 1590) As far as the record discloses, the Employer does not require charge nurses to use the in-service.

The extent of a charge nurse's monitoring function is also in doubt. Charge nurse Cynthia Swift testified that a few months prior to the instant hearing, nurses were in-serviced to "follow" their aides. (Tr. 1642) What this injunction meant was not explored during Swift's testimony, no other witness was asked about it, and the in-service was not introduced. Veteran charge nurse Terry Ferguson explained that she observes aides as she goes about her own duties, but does not go into patient rooms with the specific goal of monitoring aides' work. (Tr. 1943) Charge nurse Holly Cranford made the same point, and added that no one ever gave her the responsibility to oversee aides or other floor staff. (Tr. 1731-1732, 1734) Charge nurse Angela Theisen testified that she has

never been told it is her responsibility to assure that aides' work is completed (Tr. 1688), although, as shown above, one aide was so informed. (E Exh. 57)

DON Maddux testified that, in order to protect patients' well-being, charge nurses monitor and correct non-nursing employees as well as aides. Drawing on hearsay reports, the DON explained that charge nurses intervene to assure that dietary workers prepare and serve the correct food, housekeepers stow chemical-laden carts, and laundry workers properly handle patients' clothing. (Tr. 188-190) The only concrete example of purported direction by a charge nurse to a non-nursing employee was Denise Lisek's timely interception of a food tray bearing crabcakes for a patient with a shellfish allergy. (Tr. 190-191, 615-617) Based on Lisek's report of the incident, the dietary manager suspended the erring cook. (E Exh. 51) DON Maddux stated that an aide would be expected to take the same steps as did Lisek. (Tr. 617)

Charge nurse Elizabeth O'Rourke testified that she effectively prioritizes maintenance jobs when she submits a wheelchair repair work order as "urgent." (Tr. 1490) However, she did not cite specific instances, no work orders were introduced into evidence, and no witness explained how the maintenance department interprets and effectuates work orders from charge nurses.

Setting Aides' Work Breaks

Article XIII of the UAW contract gives aides a 30-minute lunch break and 30 minutes of additional relief that may be taken in one or two segments. The contract reserves to management the power to time breaks according to the facility's needs. An aide must notify the charge nurse before leaving the floor, and will be in-serviced for failing to do so. (E Exh. 21)

The DON testified that charge nurses assess patient care needs to decide when aides may leave the floor to take a break. (Tr. 192) Neither she nor any other witness gave a concrete occasion to illustrate how the factors are weighed. In contrast, charge nurse Jennifer Jukuri testified that her aides generally give her notice, but she does not decide when they may go. (Tr. 1958) Former aide Elmer Burnette stated that in his experience, aides usually picked their own break times and wrote them on the daily assignment sheet. (Tr. 1923) Charge nurse Corin Greene testified that she would withhold permission if an incontinent patient needed immediate attention (Tr. 1246), but the example was hypothetical. Greene also said that she once instructed an aide not to take a break, but did not recall the circumstances. (Tr. 1291) Her conclusionary testimony was the only record evidence that a charge nurse has ever denied an aide permission to begin a break.

A previous Employer administration issued a 2003 verbal warning to charge nurse Heather Ouellette, citing numerous problems on the unit, including three aides being on

break simultaneously. (E Exh. 11) The record does not reveal the total number of aides scheduled at the time of the lapse. Without more detail, which the Employer did not adduce, it is unknown for what Ouellette was specifically faulted.⁴

The Employer adduced evidence that a charge nurse may recall an aide from a break. Nurse Corin Greene testified that if a patient requires immediate attention, and neither she nor anyone else is available, she will summon an aide from break. She did not give specific instances. (Tr. 1247-1248) Nurse Janette Reau testified that a week before the hearing, she paged aide Gigi Childs to return from break in order to assist a soiled patient who had not yet been out of bed. (Tr. 1204) The record contained no evidence of other actual interruptions of an aide's break by a charge nurse.

Deciding Aides' Requests to Leave Early

DON Maddux testified that a charge nurse may permit an aide to leave before the end of the scheduled shift. (Tr. 210-211) Nurse Janette Reau recalled the DON's stating at a monthly charge nurse meeting that nurses may grant such a request for good cause. (Tr. 1152-1155) Reau said 10 or 12 other charge nurses attended the meeting, but none testified in corroboration on this point. The record does not reveal whether the DON set good-cause parameters at or since the meeting Reau mentioned. However, nurse Stephanie Ouellette testified that previous DONs issued standing instructions to let sick aides go home. (Tr. 2164-2165) The evidence that charge nurses Elizabeth O'Rourke and Angela Theisen released sick aides early, without consulting first with higher management (Tr. 1346-1347, 1681), tends to confirm the existence of that standing order. As Theisen testified, the aide she excused was vomiting and in no condition to stay, leaving her no choice but to send him home. (Tr. 1697)

The record contains evidence of four other instances that charge nurses assertedly acted unilaterally in this area. Nurse Janette Reau permitted aide Gigi Childs to leave briefly to pick up her children. It was toward the end of the shift, and one of the weight machines that Childs needed to perform her remaining duty was broken. (Tr. 1200, 1221, 1222) Nurse Heidi Dozier granted a laundry employee's request to leave early due to a family member's death. No laundry department supervisor was on site at the time. (Tr. 2228, 2254-2255) Nurse Corin Greene claims that she used her judgment in allowing aide Chastity to leave early (Tr. 1292), but the reason for Chastity's request is unknown, leaving the record unclear as to how discretionary Greene's response was. Nurse Angela Theisen acquiesced when aide Tyla announced that she was leaving early to deal with a police matter at home. (Tr. 1680, E Exh. 68) The alternative, as Tyla described it to Theisen, was for the police to come to the Employer's facility. (Tr. 1696)

⁴ The Union urged that E Exh. 11 be rejected on the ground that a grievance settlement called for it to be expunged from Heather Ouellette's record. That it was expunged for future disciplinary purposes does not prohibit its use, or detract from its probative value, in this proceeding. The hearing officer properly admitted it.

In contrast to the foregoing, nurse Gayle Shaw was never informed she had the power to grant aides' requests to leave early. (Tr. 1581) Nurse Cynthia Swift testified that she declines to act independently when aides request to leave early, and refers them to management instead. (Tr. 1618, 1629) Aide Gigi Childs stated that she directs her requests to the charge nurse, who consults with a manager before relaying the decision. (Tr. 1101-1102, 1106)

Holding Charge Nurses Accountable for Aides' Performance

It is a tenet of nursing practice that the entire nursing chain of command is responsible for the patient's well being. (Tr. 1035-1036, E Exh. 84) However, there is some dispute as to how, or whether, the Employer implements the rubric.

The record evidence as to whether charge nurses have ever been disciplined for aides' malfeasance is murky. There is documentary evidence that charge nurses have been called to task for the conduct of the aides on their unit. But in all six such cases, the charge nurse shared responsibility to perform what the aide failed to do or did poorly.

Nurses Peggy Mayner and Amanda Jordan were verbally warned and in-serviced, respectively, when aides did not obtain patients' weights. (E Exhs. 9, 12) Though weighing patients usually falls to the aide, the task is not considered completed until the weight is entered in the medical administration record (MAR), a duty that belongs to the nurse. For that reason, nurse Theisen explained, she will obtain the patient's weight if the aide has not. (Tr. 1702) The corrective actions to Mayner and Jordan faulted them for failing to take the steps necessary to discharge their duty to document. (Tr. 81-83, 102-103, 475, 1146)

Nurse Shannon Leveque received a single in-service for five omissions. (E Exh. 54) Four were her own duties as a nurse to document weight, take wound measurements, initiate wound treatment, and prepare treatment sheets for a newly admitted patient. The fifth was that she and the aide neglected to obtain the patient's weight. (Tr. 913, 916-917, 969, 989)

Nurse Jennifer Carver received a written warning because one-hour monitor checks were not recorded for a patient presenting a high fall-risk. (E Exh. 13) Charge nurses and aides share the duty of filling out the monitor sheets, said Clinical Coordinator Jennifer Greening. Carver was as delinquent as the aide for not doing so. (Tr. 1019, 2364)

DON Maddux and charge nurse Janette Reau testified that nurses are told they are subject to discipline if a patient's call light is not promptly answered. Corin Greene received an in-service to that effect. (Tr. 85, 1148, E Exh. 7) But, as the DON also

testified, nurses and aides share the duty to answer calls, and both wear pagers tied to the call light system. (Tr. 84, 477) Nurses are responsible not just for overseeing that aides respond to the summons, but for responding themselves. (Tr. 1367-1368)

As mentioned above, nurse Heather Ouellette received a verbal warning in 2003, under a previous DON and facility administrator, for assorted improprieties on her unit. (E Exh. 11) On its face, the warning lists “snacks still in the unit; incontinent residents were not changed timely; no direction provided to staff; handwashing not being done; call lites [sic] not answered timely; also observed 3 CENA’s [sic] off the unit at the same time.” The record provides no substantive details about the incidents, so it is unknown who was remiss for leaving snacks in the unit, who was failing to wash whose hands, or generally to what extent Ouellette was being punished for spotty oversight and personal errors of omission.

The Employer concedes that nurses’ in-services, such as those noted above to Amanda Jordan and Shannon Leveque, have no bearing on pay or benefits. (E Brief, p. 34) This is due to their being outside of, and not subject to, the progressive disciplinary system of the charge nurses’ Union contract. (J Exh. 1, pp. 29-30) The Employer argues that nurses’ in-services may influence future promotions and discipline, but the record does not contain proof of the latter claim.

Recent performance evaluations of at least six charge nurses commented on their need to oversee aides. The narrative sections stated, for example, “continue to supervise CNAs educating and disciplining when appropriate” (E Exh. 34), “use leadership skills to continue to supervise CNAs and train orientees” (E Exh. 35a), “continue to monitor and supervise CNAs” (E Exh. 35c), and “supervise subordinates more closely to assure proper care given” (E Exh. 35g). There is no evidence that evaluations are the basis for either any reward or adverse action against the evaluated nurse. DON Maddux admitted that charge nurse evaluations do not affect compensation or benefits, but asserted that they might affect promotional opportunities or lead to discipline. (Tr. 296-297) The record does not establish that any evaluation has had an impact in either way.

The Employer adduced testimonial evidence that it has advised charge nurses they may be subject to disciplinary action for errors committed by aides. Charge nurse Janette Reau recalled DON Maddux telling her, when she was hired, that she would be disciplined for her aides’ errors. (Tr. 1143) PM Manager Austermiller testified that she has not warned charge nurses they may be disciplined for their aides’ actions, but has reminded nurses they are responsible for assuring things are done correctly. (Tr. 792) Clinical Coordinator Nicole Nutt’s testimony on the subject was as follows:

Q. BY MR. PECOR: Are charge nurses accountable for aides?

A. Yes.

Q. And can you give some examples of how that would be?

A. I mean they're held accountable for every aspect of the patient's care. They're the ones who are ultimately responsible to make sure that anything and everything that patient needs is completed.

Q. Have you ever told the charge nurse they would be disciplined for an aide's failure to perform tasks?

A. Yes.

Q. You've mentioned call lights and weights. Are there other examples of that?

A. Off the top of my head, I don't really recall a specific one.

(Tr. 926-927)

The Union presented another picture. Charge nurse Terry Ferguson maintained that so far in over four years, no one has warned her that she is subject to adverse action for her aides' misfeasance. (Tr. 1940) Current nurse Jennifer Jukuri did not recall any such warning either. (Tr. 1961) Charge nurse Stephanie Ouellette testified that she is not held responsible for her aides' errors, adding that no trouble ensued for her when her aide, in an incident that caused his termination, left a patient wet and untended for six and one-half hours. (Tr. 2099; E Exhs. 24, 25)

Stephanie Ouellette's testimony particularized a significant pattern. As recounted in the Discipline section below, aides have been penalized for misconduct across a wide spectrum, including leaving patients lying for hours in body waste. It is undisputed that no charge nurse has been disciplined, demoted, or otherwise adversely affected for the wrongdoing cited in the many aide disciplines in the record. DON Maddux explained that the nurses over those aides did nothing wrong, were not negligent, and fully acquitted themselves by discovering and reporting the incidents. (Tr. 672-673) No witness reconciled that conclusion with the notion of charge nurses' putative accountability, or even with the nurses' affirmative duty to make periodic rounds, every two hours according to one job description (J Exh. 3), to oversee the care provided by aides.

Transfers

When scheduled aides are either absent or sent home due to low patient census, a staffing imbalance among the units may arise. To correct it, one or more aides may be pulled from one unit to another, with the object of restoring staffing levels to those prescribed by the scheduler. Usually, the affected charge nurses will concur on which

aide to transfer by referring to a float sheet that helps equalize the number of times aides are pulled. (Tr. 2398) In many cases, according to aides Tiki Morris and Andrea Short, the process is so formulaic that aides, rather than charge nurses, take care of it themselves. (Tr. 2043-2044, 2398-2400)

The record reveals two occasions that charge nurses ignored the float sheet in order to retain their more experienced aides. Nurse Heidi Dozier loaned another unit her least skilled aide, rather than the two aides who had requested to go or the one whose transfer was indicated by the float sheet. (Tr. 2227, 2442-2443, 2449-2450) Another time, nurse Denise Lisek testified that she did not check the float sheet, but loaned one aide instead of another, because the former had stronger skills. (Tr. 2460, 2463)

The Employer urges that charge nurses have also influenced permanent transfers of aides. Only one situation was adduced. According to DON Maddux, charge nurse Lisek advised her that an aide was having difficulty working on the Pleasant View unit. Later, Clinical Coordinator Jennifer Greening told the DON that the aide was being transferred to the slower-paced Pleasant View Heights unit. (Tr. 55, 524-627) Although called as witnesses, neither Lisek nor Greening testified about the matter. As a result, the record does not reflect what role Lisek played, or how the transfer decision was reached.

Discipline – Suspension – Discharge

Issuing One-on-One In-Services

No Employer document describes the purpose or procedures regarding written in-services. (Tr. 379) There is consensus, however, that they are educational in nature, and are outside the progressive disciplinary system described in the UAW contract and the Employer's employee handbook. (J Exh. 2, p. 19 et seq.) For this reason, UAW representatives do not, and may not, attend in-service meetings. (Tr. 2027) DON Maddux testified initially that in-services are grievable (Tr. 265), but later suggested that she meant only that in-services are sometimes referred to during grievance meetings. (Tr. 669) No witness confirmed that an in-service may be grieved, nor is there evidence that any ever has been.

In the past, corrective counseling to aides was either given orally, as Clinical Coordinator Greening said she did as a charge nurse (Tr. 1047), or memorialized in writing. (Tr. 1041, 1076) An apparently older form, examples of which are in the record, states at the bottom: "This counseling will be reviewed by nursing management for further investigation and will go in the employee's file if warranted." (E Exhs. 61, 80; U Exhs. 16, 17) The most recent known use of this in-service form is June 3, 2008. The record is silent on whether it is still in use; if not, when it was discarded; on whose orders; and whether charge nurses were informed.

About March 2008, the Employer instituted another written counseling form, which is commonly used for in-services today. (Tr. 1039-1040) Entitled “One on One In-Service,” it has lines for signatures of the employee being counseled and her “In-Service Instructor or Supervisor,” and a set of lines for a narrative. It does not contain the precursor form’s bottom inscription quoted above. (E.g. E Exh. 12)

A charge nurse decides if and when to issue a written in-service, and presents it personally to the aide, without the need for prior approval from upper management. (Tr. 264) Normally, a nursing manager does not investigate the subject of an in-service before the charge nurse delivers it. (Tr. 264, 918-919) An exception is in the case of patient abuse or neglect, which by State regulation must be promptly investigated and reported by management. (Tr. 264) If that degree of misconduct is suspected, the in-service will ordinarily be superseded by actual punishment under the Employer’s progressive disciplinary scheme.

Both charge nurse Holly Cranford and UAW steward/aide Penny Hoffman recalled DON Maddux saying that anyone who observes wrongdoing, not only a charge nurse, is entitled to issue an in-service. (Tr. 1717, 1728, 2394-2395) DON Maddux and MDS Coordinator Vanderlaan maintained that in-services are corrective tools reserved for use only by charge nurses and those higher in the chain of command. (Tr. 2276-2277, 2431-2432) The record contains in-services issued by charge nurses, clinical coordinators, other nursing managers, and the maintenance director, but none by aides or others who are undisputedly employees.

The DON testified that once an in-service issues, the next like offense will result in grievable punishment under the progressive disciplinary system. She likened the in-service to a “get-out-of-jail-free card.” (Tr. 235) The Employer did not point to any specific examples of progressions to establish the truth of this generality. Other evidence muddies the notion of ineluctability. Charge nurse Cranford testified that the DON assured her in-services “would not lead to discipline.” (Tr. 1716) An aide was in-serviced on November 11, 2008, for leaving refuse on the unit (E Exh. 63), and received only an in-service, not discipline, when she committed the same infraction on January 22, 2009. (E Exh. 73; Tr. 2042-2043) UAW steward Tiki Morris once remonstrated, during a grievance meeting over discipline of aide Gigi Childs, that because the UAW is precluded from representing aides when in-services are presented, the Employer may not rely on in-services to justify subsequent discipline. DON Maddux’s specific response to the argument is unknown, but she agreed to rescind the discipline. (Tr. 2029-2033)

Charge nurse Elizabeth O’Rourke testified that she issues one or two in-services per month. (Tr. 1328) Charge nurse Corin Greene’s current rate is fewer than one or two in-services per month. (Tr. 1242-1243) Clinical Coordinator Nicole Nutt oversees Meadow View, by far the largest unit, and is copied on all in-services that her nurses issue. She sees about one or two in-services per week. (Tr. 932-933)

In-services to aides are sometimes co-signed by a charge nurse and a clinical coordinator. (E Exhs. 57, 58, 62, 66) Aides may also be presented with in-services signed solely by upper managers. (E Exhs. 8, 69, 80; U Exhs. 10, 12, 16, 17) There is no evidence as to whether manager-issued in-services have greater weight.

The Employer retains in-services, but the record does not establish where. DON Maddux said they are kept in the employee's personnel file. (Tr. 234) Charge nurse Stephanie Ouellette testified that MDS Coordinator Christina Vanderlaan assured her in-services are not maintained with regular personnel records, but rather in a separate in-service file. (Tr. 2076-2078) Vanderlaan denied having the conversation. (Tr. 2280-2281) Charge nurse Holly Cranford testified that DON Maddux promised that in-services are not discipline and would not go into a disciplinary file. (Tr. 1716)

*Issuing Discipline*⁵

Authority to terminate nursing department staff belongs to the facility administrator, DON, ADON, PM manager, MDS coordinators, and clinical coordinators, but not charge nurses. (Tr. 43-44)

Discipline issues on an Employee Counseling Record (ECR), a form that has boxes to indicate the severity of the penalty (verbal warning, written warning, three-day suspension, or termination); spaces for narratives regarding the offense; and lines for signatures of the disciplined employee, the supervisor, and a witness. All such portions are typically completed. The ECR also has a bottom portion that elicits whether the action was approved or not approved; if the latter, how the discipline was downgraded; the reason for the change; and the dated signature of the reviewing official. Of the 31 ECRs in the record, 29 had no markings at all in the review portion just described, and the 2 with markings were checked "approved." Whatever significance this has was not covered at the hearing or addressed in the parties' briefs. I surmise that formal review may seldom occur, and the issuing supervisor's action is effectively final.

Section 2(u) of the management rights clause in the UAW contract states: "Any disciplinary action will be presented by management, but does not diminish the authority or responsibility of charge nurse to initiate disciplinary action." (J Exh. 5, p. 9) The record does not include the bargaining history of the provision, or any decisions, settlements, or memoranda interpreting it. DON Maddux agreed that the language bars a

⁵ For the sake of clarity, and without prejudice to the Employer's argument that in-services constitute discipline within the meaning of Section 2(11), the terms "discipline" or "disciplinary" will hereafter refer not to one-on-one in-services, but to adverse personnel actions that comprise a step in the progressive disciplinary system outlined in the Employee Handbook, and that aides may grieve under the UAW contract.

charge nurse from delivering a disciplinary notice to an aide. (Tr. 225) The Union concurs. (U Brief, p. 19)

The Employer nonetheless argues that on one occasion, a charge nurse issued a verbal warning to an aide. (E Brief, p. 22) In that case, an aide's wrongdoing was reported anecdotally by both charge nurse Nicole Thompson and MDS Coordinator Christina Vanderlaan. (Tr. 353; E Exh. 46, p. 2) ADON Priscilla "Jill" Kontry initiated disciplinary action. (Tr. 358) Kontry later advised DON Maddux that nurse Thompson had "participated" in issuing the discipline. (Tr. 599) No direct evidence established the nature of the participation. The Employer offered the DON's hearsay testimony that nurse Thompson presented the discipline, with Kontry attending as a witness. (Tr. 352) The form does show Kontry's name on the witness line, and an illegible signature that the DON identified as Thompson's on the supervisor line. (Tr. 354; E Exh. 46) Where they signed may not be dispositive, however, because some ECRs have misplaced signatures. (E Exh. 44 – DON's signature on employee's line; E Exh. 51 – employee's and manager's signatures reversed) DON Maddux did not explain why Thompson would have presented the warning and signed as supervisor, in what would seem to be a clear breach of section 2(u) of the UAW contract, except to note that the disciplined aide did not object. (Tr. 353-354) Neither Kontry, Thompson, nor the aide testified to shed light on the mystery.

There is no additional evidence that a charge nurse has issued discipline to an aide, and none at all that a charge nurse has issued discipline to a non-nursing employee.

Making Disciplinary Recommendations

DON Maddux asserted that charge nurses may, and do, recommend discipline for aides, including suspension and discharge. (Tr. 44) In contrast, charge nurses Charlotte Prater, Gayle Shaw, and Terry Ferguson testified that they were never advised they may recommend discipline. (Tr. 1514, 1580, 1936) The DON said that there have been discussions with individual charge nurses about how to discipline. No specifics about this appear in the record. The DON concedes that the Employer has not conducted formal group training for charge nurses on the subject. (Tr. 450-451)

Unlike nursing managers at and above the level of clinical coordinator, charge nurses do not have access to employee personnel files, which are kept in locked files. (Tr. 48, 225, 507-509) Consequently, they do not know aides' disciplinary histories or the appropriate next step in the disciplinary progression. (Tr. 48, 225)

In her testimony, DON Maddux adverted to written anecdotal reports by charge nurses as examples of disciplinary recommendations. There can be little doubt that most discipline of aides is triggered by reported observations made by charge nurses, who tend patients alongside aides and are trained to notice when patient care is amiss. The parties

adduced 21 written reports by charge nurses describing observed incidents of aide misconduct. The reports are attached most often to ECRs, and in a few cases to in-services, of aides. They contain detailed factual allegations; not one recommends discipline. (E Exhs. 17, 18, 22 - 24, 26, 31, 35, 37, 41, 43 - 46, 51, 56)

The Employer relies on the following instances to establish that charge nurses effectively recommend discipline. Some cases involve alleged oral recommendations by charge nurses. In every case, whenever a written report is mentioned, it is a first-hand account of events that, as noted above, does not contain a disciplinary recommendation.

E Exh. 18 – Three-day suspension dated September 30, 2008 to an aide

After charge nurses Corin Greene, Heidi Dozier, and Elizabeth O'Rourke filed separate written reports that an aide's patients were saturated in body wastes, Greene and O'Rourke orally recommended to Clinical Coordinator Nicole Nutt and DON Maddux that the aide be disciplined. (Tr. 1238, 1329-1330) Nutt questioned the aide about the matter in the absence of any charge nurse (Tr. 1993-1995), and then issued a three-day suspension.

E Exh. 20 – Termination dated May 19, 2009 of an aide

Charge nurse Elizabeth O'Rourke orally recommended to Clinical Coordinator Nutt that a probationary aide be discharged for gross neglect, including failing to feed a patient. (Tr. 882, 940, 1333-1335, 1453) Nutt maintained that she did not investigate the matter, but the record belies the claim. First, she spoke to another aide, identified as Jessica, to verify that it had been the aide's job to feed the patient in question. (Tr. 2019-2120, 2372) Then she summoned the aide to answer questions about the incident, while Nutt took notes. (Tr. 942, 2017-2019) Because the aide was within her 90-day probationary period, she was not afforded a UAW representative during the questioning. (Tr. 943-944) At the conclusion of the session, Nutt presented a prepared termination notice, citing the aide for patient abuse and neglect. (Tr. 943) O'Rourke signed as a witness.

E Exh. 22 – Verbal warning/counseling dated October 9, 2008 to an aide

Nurse Elizabeth O'Rourke submitted a written report detailing an aide's alleged rudeness to O'Rourke. The two engaged in a subsequent conversation that mollified O'Rourke. O'Rourke then urged DON Maddux and Clinical Coordinator Nutt not to issue the aide a disciplinary warning that, as far as the record reveals, O'Rourke had never recommended. (Tr. 197-200, 1461-1462) The aide received a verbal counseling. (Tr. 673-674)

E Exhs. 24 and 25 – Termination dated July 16, 2008 of an aide

Charge nurse Stephanie Ouellette submitted a written report that she found an aide's patient on the floor, soaked in urine. The aide claimed to have forgotten the patient was his. Ouellette orally told DON Maddux that the aide's actions were "not

acceptable” and she was “very very upset” by them. (Tr. 2067-2068) Charge nurse Elizabeth O’Rourke surmised, from the patient’s skin breakdown, that the aide had ignored the patient for eight hours. (Tr. 1404) O’Rourke did not make a written report, but orally recommended that the aide be discharged for gross neglect. (Tr. 1394)

On the day of the discovery, DON Maddux summoned the aide and his UAW representative to her office, with Clinical Coordinator Greening attending, and asked him what happened. At the end of the session, the DON said she would continue her investigation and sent the aide home for the rest of his shift. (Tr. 1866-1868) The following day, the DON, unaccompanied by any charge nurse, presented the aide a discharge notice. (Tr. 1868-1869) After the fact, O’Rourke wrote her name next to the DON’s on the already-issued ECR. (Tr. 1406)

E Exh. 36 – Written warning dated September 18, 2008 to an aide

A foul odor lured nurse Elizabeth O’Rourke and DON Maddux to a patient’s room, where they noticed that the patient, assigned to an aide, was wet. The DON asked O’Rourke to speak to the aide. (Tr. 1421-1422) The aide claimed to have changed the patient minutes earlier, which O’Rourke considered untruthful, so she orally recommended to the DON that the aide be disciplined for lying and failing to complete her tasks. (Tr. 317, 1424-1426) The DON told O’Rourke that she would talk to the aide herself. (Tr. 1425) Before that occurred, the aide, with her UAW representative, was questioned about the matter by ADON Tracy Wyatt. (Tr. 1879, 1882-1883) After Wyatt’s vetting, DON Maddux questioned the aide further, during which a UAW representative was again present, but nurse O’Rourke was not. (Tr. 1425, 1883-1884) The aide received the discipline at the conclusion of the DON’s inquiry. (Tr. 1884-1885)

U Exh. 9 – Three-day in-house suspension dated October 1, 2008 of the aide noted immediately above

Fewer than two weeks after the aide received the written warning described above, nurse O’Rourke observed a patient tell the aide she was saturated in urine, saw the aide do nothing, and heard her deny that the patient mentioned anything. (Tr. 1331-1332, 1432-1433) O’Rourke prepared an in-service (E Exh. 37), but before issuing it, informed Clinical Coordinator Nicole Nutt that she did not feel the aide was able to give proper care, because she had once again ignored a patient’s needs and lied about it. (Tr. 1433-1434) As DON Maddux explained it, the aide had already received progressive discipline, so Nutt aborted the in-service (Tr. 329), and instead completed the appropriate next step, suspension. (Tr. 2335-2336) Nutt labeled it an in-house suspension, thus allowing the aide to work.

E Exh. 38 – Termination dated October 3, 2008 of the aide noted immediately above

The very day after the aide received the three-day in-house suspension discussed above, she again left her patients in an unclean state, and charge nurse Jennifer Jukuri

issued an in-service. (E Exh. 81) There is no evidence that Jukuri recommended a disciplinary penalty.

DON Maddux testified that O'Rourke recommended discharge (Tr. 319), but the evidence does not support it. First, the DON did not specify what words O'Rourke used, or when. Second, although the DON claims that Clinical Coordinator Nicole Nutt approved the recommendation, Nutt did not corroborate that O'Rourke even made one. Third, O'Rourke's own testimony revealed no statement beyond telling Nutt on October 1, 2008, in connection with the earlier in-house suspension, that she believed the aide was incapable of caring properly for patients. (Tr. 1432-1439) Fourth, the DON admitted that she and O'Rourke did not have any conversation about the incident prompting the discharge, until O'Rourke's after-the-fact request to sign the already-issued ECR. (Tr. 326, 584) Finally, when the DON was asked if O'Rourke's remarks figured into her discharge decision, she answered that it was O'Rourke's reported observations of the aide's conduct, and her position on the disciplinary ladder, that were dispositive. (Tr. 319-320)

E Exh. 55 – Verbal warning dated October 24, 2008 to an aide

Charge nurse Corin Greene showed Clinical Coordinator Nutt an in-service to an aide for inadequate care of an incontinent patient. (Tr. 902-903; E Exh. 56, p. 1) Nutt asked Greene to expand on her observations, and captured them in a statement that Nutt wrote and Greene signed. (Tr. 904-905; E Exh. 56, p. 2) According to Nutt, Greene recommended stronger discipline in addition to the in-service. Greene testified that she was not certain she made such a recommendation, was unsure to whom she may have made it, could not recall the specific conversation and, until the instant hearing, never saw the verbal warning that ensued. (Tr. 1239, 1241, 1283)

E Exh. 60 – Termination dated December 29, 2008 of an aide

The aide was a probationary aide at the time of her discharge (Tr. 2346, 2348), which was triggered by a patient's family complaining to charge nurse Janette Reau that the aide ignored the patient. Finding the patient soiled, Reau reported the situation to Clinical Coordinator Jennifer Greening, and asked that the aide be discharged. (Tr. 1127-1128) After inspecting the patient herself, Greening decided that discharge was appropriate. (Tr. 1058-1059)

As Greening testified, her decision depended upon Reau's alerting her to the problem, and her personal observation of the patient's condition. (Tr. 1060)

E Exh. 28 – In-service dated October 24, 2008 of an aide

At the request of a patient, charge nurse Corin Greene removed the assigned aide and substituted another. When the latter aide objected, Greene in-serviced her and recommended to Clinical Coordinator Nutt or DON Maddux that the aide be disciplined. (E Exh. 28; Tr. 1251) There is no evidence that the recommendation was adopted.

E Exh. 17 – Three-day suspension dated November 24, 2008 of the aide noted immediately above

One month after the incident described above, charge nurse Angela Theisen gave Clinical Coordinator Nutt a note stating that the aide falsely reported having given a patient a shower. (E Exh. 17, pp. 2-3) DON Maddux testified that Theisen recommended discipline (Tr. 148-149), but the record does not support the claim. Theisen's handwritten note does not contain any recommendation. Nutt's testimony failed to corroborate the alleged recommendation. (Tr. 887-888) Theisen testified that she slipped the note under Nutt's door, did not make any disciplinary recommendation, and did not intend the note to be interpreted as one. (Tr. 1658-1659)

Upon receiving Theisen's information, Nutt interviewed the patient herself and made a written record of what he said. (E Exh. 17, p. 4) When the patient confirmed that he had not received a shower, Nutt judged that discipline was appropriate, and checked the aide's personnel file to learn where she stood in the disciplinary progression. (Tr. 887-888) Nutt then issued the three-day suspension.

E Exh. 23 – Termination dated December 22, 2008 of the aide noted immediately above

DON Maddux testified that charge nurses Elizabeth O'Rourke, Heidi Dozier, and Corin Greene all urged her in September or October 2008 to discharge, or at least suspend, the aide. (Tr. 239) The record shows that those three nurses filed individual written reports about problems they observed on September 29, 2008. (E Exh. 18, pp. 2-4) The reports led to the issuance of a three-day suspension on September 30, 2008. (E Exh. 18, p. 1) The reports themselves were observational and did not contain recommendations. O'Rourke said that she recommended some kind of discipline in connection with the September 29 incident (Tr. 1330), but did not testify that she recommended discharge or suspension. Neither Dozier nor Greene testified to making any disciplinary recommendation regarding the aide.

At any rate, the Employer did not discharge the aide until December 22, 2008, about three months after the DON claims that the nurses recommended termination. Between the time of the asserted recommendations and the ultimate severance, the aide received not only a three-day suspension on September 30 (E Exh. 18), but also an in-service on October 24 (E Exh. 28), and another three-day suspension on November 24 (E Exh. 17).

Before being discharged, the aide was summoned to DON Maddux's office, where the DON and Clinical Coordinator Nutt asked her questions about her conduct. No charge nurse was present. At the end of the session, the DON told the aide they would investigate further and get back with her. Later the same day, the aide was called into another meeting with the DON and Nutt, and discharged. (Tr. 2002-2007)

E Exh. 19 – Termination dated May 6, 2009 of an aide

Clinical Coordinator Jennifer Greening received multiple complaints, and copies of in-services, from charge nurses Denise Lisek, Nicole Thompson, and Lauren Evans about a probationary aide. (Tr. 157) For reasons not revealed in the record, Greening considered the nurses overly demanding. She rescinded the in-services, placed the aide back on orientation, and later transferred her to an easier unit. Despite Greening's remedial efforts, the aide continued to evoke nurse complaints. Ultimately, Greening discharged her. (Tr. 1004-1010) As the DON acknowledged, Greening's decision was an exercise of her own judgment. (Tr. 157)

E Exh. 51 – Three-day suspension dated December 12, 2008 of an aide

As discussed in the Responsible Direction section above, a charge nurse caught and reported a dietary aide's mistake of serving crabcakes to an allergic patient. Lisek's written report (E Exh. 51, p. 2) is factual, not recommendatory, and Lisek, though called as a witness, was not asked about the incident. There is no evidence that any charge nurse made a disciplinary recommendation resulting in the suspension, which was issued by the dietary manager.

U Exh. 11 – Termination dated February 16, 2009 of an aide

An aide was discharged after DON Maddux received misconduct reports from charge nurse Elizabeth O'Rourke and admissions director Christine Gillenkirk. The DON interviewed the aide to get her side before issuing the termination notice. (Tr. 618-623) There is no suggestion, in the testimony of either the DON or O'Rourke, that any charge nurse made a disciplinary recommendation resulting in the discharge.

E Exh. 31 – Termination dated August 11, 2008 of an aide

DON Maddux testified that charge nurses O'Rourke and Jukuri recommended that an aide be discharged for insubordination. (Tr. 273-277) Their written reports of the triggering incident do not contain any personnel recommendations (E Exh. 31, pp. 2-3), and there is no evidence of oral recommendations. In O'Rourke's account, she did not recommend discipline, but complained to the DON that the aide's rudeness created a hostile environment. (Tr. 1344-1345) Jukuri testified that she did not make a disciplinary recommendation. Moreover, she said, the written statement bearing her signature was composed by Clinical Coordinator Nicole Nutt, who investigated the matter. (Tr. 1951-1953) I infer that Nutt also composed the written statement bearing O'Rourke's signature, because the handwritten text of each statement is identical, O'Rourke's name initially was unaccountably misspelled on her statement, and Nutt co-signed both.

E Exh. 53 – Termination dated April 27, 2009 of an aide

On April 18, 2009, charge nurse Terry Ferguson observed a probationary aide sleeping on the job. She issued him an in-service and reported what she saw to Clinical

Coordinator Nutt, but did not make a disciplinary recommendation. (Tr. 1933-1934; E Exh. 53, p. 3) On April 19, charge nurse Elizabeth O'Rourke in-serviced him for leaving his assigned patients unacceptably wet and untended. (E Exh. 53, p. 4) Her in-service warned the aide that further occurrence would result in discipline, but there is no evidence that she ever recommended discipline to upper management.

Clinical Coordinator Nutt and DON Maddux brought in the aide for questioning. Though the DON suggested he be discharged, Nutt took no immediate action other than to assign him a new training mentor. (Tr. 882-883) Only when the new mentor reported that the aide still lacked basic skills, and O'Rourke confirmed that he was not improving, did Nutt finally discharge him. (Tr. 884, 953-955) As far as the record reveals, the only individual who specifically recommended discharge was DON Maddux.

E Exh. 45 – Termination dated July 3, 2008 of an aide

Charge nurse Holly Cranford placed a written statement under DON Maddux's door, reporting that a probationary aide was leaving early without completing her work, and sleeping during her shift. (E Exh. 45, p. 2) Cranford did not intend the report to lead to discipline or be taken as a disciplinary recommendation, and she never spoke to the DON about the matter. (Tr. 1719-1720) DON Maddux concurred that she and Cranford did not discuss the situation, nor did she talk to anyone else on the nursing staff before deciding to terminate the aide. (Tr. 349, 598-599) There is no evidence, or claim, that the DON's determination was based on a nurse's disciplinary recommendation.

E Exhs. 41, 43, 44 – Verbal warning dated June 20, 2008, written warning dated October 6, 2008, and three-day in-house suspension dated October 20, 2008 of an aide

Each of the disciplines is supported by first-hand reports and care records submitted by the nurses who observed an aide's misdeeds. Like all of the written reports in the record, these do not contain disciplinary recommendations. In her testimony about the incidents, DON Maddux did not claim that any charge nurse recommended the aide's disciplines. (Tr. 329-335) Two of the reporting charge nurses testified at the hearing, and said nothing about making an oral recommendation (Denise Lisek, Stephanie Ouellette). The other two charge nurses were not called as witnesses (Karen Raines, Shannon Leveque). Based on her review of the June 20 warning (E Exh. 41) and the aide's personnel file, the DON decided to change the level of the warning from written to verbal. (Tr. 336-337) The October 6 written warning (E Exh. 43) and October 20 suspension (E Exh. 44) were reviewed by both the DON and ADON Tracy Wyatt. (Tr. 332-334)

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DON Maddux testified that charge nurses' disciplinary decisions are rarely overturned. (Tr. 53-54) Clinical Coordinator Nicole Nutt could not recall a time that she rejected a charge nurse's recommendation, and estimated that she approves 95 to 99 percent of them. (Tr. 921, 922, 976-977) What they meant by disciplinary decisions and

disciplinary recommendations was not clarified. Because questions and answers often lacked precision in terminology, it is possible, even probable, that testimony about disciplinary decisions included in-services, and testimony about recommendations included anecdotal reports.

Nurse O'Rourke was unaware that any of her disciplinary recommendations have been rejected. (Tr. 1340) Nurse Greene initially testified that all of her recommendations were adopted, then claimed that only some were followed. (Tr. 1242-1244) None of these witnesses, or any others, provided specifics to buttress the generalizations, beyond the examples detailed above. Again, whether these witnesses equated reported observations with disciplinary recommendations, as DON Maddux did, was not examined.

Suspending Staff

DON Maddux testified that charge nurses have authority to send employees home. This happened once during her tenure, she said, when nurses Elizabeth O'Rourke and Corin Greene ejected two aides leased from a temporary agency. (Tr. 204-206) O'Rourke recalled that the matter involved one agency aide, not two, and that she, not Greene, made the decision. According to O'Rourke, it was during a weekend shift. The aide was rude, hostile, and inappropriate, so she sent her home. She did not check first with the house supervisor or an on-call manager, but reported the event on the 24-hour staffing sheet, which upper management reviews. No one in management objected after the fact. She said she would have possessed the same authority over staff aides that she exercised with respect to the agency aide. (Tr. 1347-1348, 1469-1470) Greene did not testify about the matter.

Their job description gives charge nurses the right to remove staff from the unit to avoid endangerment to the health or safety of staff or patients. All such actions must be reported to the clinical coordinator. (E Exh. 71)

Hiring

There is no evidence, or claim, that charge nurses determine when job openings exist, make hiring decisions, or are typically part of the hiring process. Authority to hire nursing department staff belongs to the facility administrator, DON, ADON, PM manager, MDS coordinators, and clinical coordinators, but not charge nurses. (Tr. 42-43)

When there is a need to hire, DON Maddux delegates the soliciting and processing of applicants to her nursing managers. (Tr. 722-723) But when nursing managers are too busy, they have sometimes asked charge nurses to conduct interviews of prospective aides. Of the 15 charge nurses called as witnesses, 5 had this role. DON Maddux cited three others as well, but none of them testified.

The record contains documentary evidence of only one charge nurse's interview of an aide. (E Exh. 52) It shows that nurse Angela Theisen asked questions from a boilerplate form, and handwrote aide candidate Jayme Kilbert's responses. In an attached narrative, Theisen stated Kilbert was "worth a shot" and explained why. DON Maddux testified that Theisen later asked a couple of times why Kilbert was not yet hired. (Tr. 715) Theisen said that she merely alerted the DON that Kilbert called to ask about the status of her application. (Tr. 1664-1666) The DON said that Theisen's was the only pre-hire interview. (Tr. 716, 721) Kilbert was eventually hired.

Charge nurse Stephanie Ouellette interviewed one aide, using prescribed questions. She described the candidate as nice, clean, and inexperienced. The applicant was not hired. (Tr. 2087-2088) Who reviewed the application, and why the applicant was not successful, were not revealed.

Charge nurse Jennifer Carver interviewed one aide, to help Clinical Coordinator Greening, who was in a meeting. Greening was too busy to give Carver a list of questions to use. Carver reported, orally, only as to the applicant's level of schooling. Carver was not informed of the hiring decision. She did not later see the candidate at the facility. Whether the applicant was hired or not, why, who made the decision, and who reviewed Carver's report were not disclosed. (Tr. 1808-1811)

Charge nurse Corin Greene held two interviews, one for an aide and the other "possibly" for a nurse. She did not make any recommendation on either occasion. She has not seen either applicant in the building, but was never advised of the outcomes. The record is likewise silent on this and all other details of Greene's interviews. (Tr. 1307-1308)

Charge nurse Elizabeth O'Rourke conducted interviews of four aides. She recommended only one, who was unable to take the job because the available schedule was unsuitable. (Tr. 1377-1378) Who received O'Rourke's one favorable recommendation, and how it figured into the decision on that applicant, are not known. With regard to the three whom O'Rourke did not recommend, no specifics, including the fate of their applications, were disclosed.

According to DON Maddux, she has hired a total of four or five aides using input from charge nurses. She said that she culled those four or five from among applicants whom the interviewing charge nurses favorably regarded, and did not further consider those whom they regarded skeptically. (Tr. 654-656) The details regarding the hiring of Jaime Kilbert are above. With regard to the others hired with asserted nurse input, there is no evidence of the aides' names, precisely what input the charge nurses offered, who reviewed the applications, who else if anyone interviewed the candidates, who made the final decisions, and how the charge nurses' input was used.

The record does not quantify the percentage of aides hired with at least some arguable charge nurse input. As the UAW's bargaining unit consists of 45 aides, the hiring of only 4 or 5 with asserted nurse input constitutes a slight percentage. If one factors in aide turnover, a rate not disclosed in the record, a figure of four or five is even less significant. There is no evidence as to how many nurse-approved candidates were not hired. Nor is there evidence as to the proportion of applicants interviewed by nurse managers versus charge nurses.

The Union argues that the foregoing evidence may not be the basis of a supervisory finding, because the practice of charge nurses' interviewing aides is alleged as an unlawful unilateral change in a pending charge. (U Brief, p. 99)

Promotion

DON Maddux testified that charge nurses supply feedback on which management relies in deciding whether to retain probationary employees. (Tr. 223-224) No specific details were adduced beyond those set forth above in the section concerning nurses' disciplinary recommendations.

The only specific instance in the record of a charge nurse's affecting a promotion was a discrete occasion involving a part-time aide's request for full-time status. Charge nurse Charlotte Prater approached DON Maddux to show her a subpoena requiring Prater's appearance at the instant hearing. The DON then solicited Prater's opinion as to whether an aide, referred to in the record as Anna, was capable of handling full-time work. (Tr. 1515) Prater told the DON that the aide was "slowly picking up speed" and could work full-time if she continued to perform good work. (Tr. 224, 1515-1516) The UAW contract requires the Employer to award jobs and shifts on the basis of (a) ability, and (b) seniority (J Exh. 5, Art. XII, §12, p. 15), but Prater testified that seniority generally determines the selection. (Tr. 1516-1517) The DON evidently approved Anna's request, but had not yet effected the conversion at the time of the hearing. (Tr. 224)

Reward – Compensation

Pay and Benefits

There is no evidence that charge nurses determine, or make recommendations regarding, rates of pay or fringe benefits for any employees. All such matters for aides are negotiated between the UAW and the Employer, with no charge nurse input as far as the record reveals.

Time and Attendance

Charge nurses do not have access to payroll information. (Tr. 48) Time and attendance are tracked by the DON and the scheduler, not charge nurses or even clinical coordinators. (Tr. 1827-1828) Time and attendance records are maintained by human resource or payroll personnel, not charge nurses. (Tr. 668)

The record does not disclose that the charge nurse is ever called upon to communicate with human resources or payroll staff. The charge nurse has no role in adjusting pay, even when she has a hand in releasing an aide early or arranging for an aide to work extra hours.

Evaluations

Aides are given periodic written evaluations, usually by the DON or the clinical coordinators. (Tr. 661-662) DON Maddux testified that “ideally” she would like input from charge nurses on all aides’ evaluations (Tr. 662), but the record does not reveal the existence of any procedure for, or systematic practice of, eliciting charge nurse input for this purpose.

DON Maddux testified that two charge nurses have each prepared and presented a written evaluation of one aide. The DON attributed this to the nurses’ strong feelings about the aides. The aides were not identified, nor were their or any other aides’ evaluations introduced. Denise Lisek was one of the charge nurses. She testified, but not about this subject. The other nurse, Nicole Thompson, was not a witness.

As noted, DON Maddux stated that evaluations of charge nurses do not affect pay, but may potentially influence opportunity for promotion or presage discipline. (Tr. 296-297) The record does not describe how this would happen, or supply an example of it occurring. Whether evaluations of aides have the same impact was not explored. The UAW contract allows the Employer to increase wages at its discretion to meet market conditions (J Exh. 5, Art. XXI, §2, p. 28), but no witness testified about this provision, or how, if at all, aides’ evaluations would figure into the calculus. The record does not show that aides are eligible for individual merit increases. In sum, there is no evidence that aides’ evaluations affect any terms or conditions of their employment.

There is no evidence that charge nurses evaluate, or influence the evaluation of, non-aide employees.

Resolving Grievances

The UAW contract defines step one of the grievance procedure as a meeting between the aggrieved employee and her “immediate supervisor.” Subsequent steps involve the grievant’s department head, the Employer’s executive director, and human resources officials. (J Exh. 5, Art. IV, §1, p. 3) Charge nurses do not represent the Employer in any of these contractual grievance steps.

The Employer points to nurse O’Rourke’s effort to mitigate punishment to an aide described above, as an example of a charge nurse’s resolving a dispute and thus averting a step-one grievance. Whether it is viewed as that, or as a charge nurse’s recommending against discipline, the event appears to be *sui generis*. The record contains no other specific instance of a charge nurse’s assertedly mediating or resolving a dispute.

On the other hand, there is evidence that on at least one occasion, a charge nurse sidestepped such a role. During a midnight shift, a UAW steward urged nurse Holly Cranford to permit a suspended aide to work. Cranford did not resolve the problem. First she telephoned on-call manager Christina Vanderlaan, who was unavailable. Then, despite her reluctance to disturb the DON in the middle of the night, she called DON Maddux, who spoke directly with the steward and aide. The DON ruled that the aide may work. (Tr. 1724-1726)

Secondary Supervisory Indicia

Uniforms

Charge nurses and aides wear the same type of uniform, consisting of scrubs in the color and pattern of their choice. (Tr. 366-367) Nurse managers at and above the clinical coordinator level wear casual business attire at least 80 percent of the time. (Tr. 660-661)

Pay

Like the PM manager, clinical coordinators, and aides, charge nurses clock in and out so that their hours may be tabulated for pay purposes. (Tr. 658-659) There is a sharp disparity between the collectively bargained hourly pay rates of charge nurses and aides, just as there is between the compensation of charge nurses and nurse managers. (J Exhs. 1, 5; Tr. 136)

Charge Nurse Job Descriptions

There are two job descriptions, set forth in three separate exhibits. (E Exh. 71; E Exh. 83; J Exh. 3, an unsigned version of E Exh. 83) The parties stipulated that E Exh.

83 / J Exh. 3 was implemented at an undefined point prior to DON Maddux's arrival. (Tr. 1276-1277) The record is silent on which of the two descriptions is the more current, or whether either is now obsolete. In its brief, the Employer quoted only from E Exh. 83 / J Exh. 3. (E Brief, pp. 18-19)

Both job descriptions refer to charge nurses as supervisory, but E Exh. 83 / J Exh. 3 uses the term more frequently. Among the "supervisory responsibilities" listed are:

- Interviews, recommends hires and trains employees
- Plans, assigns and directs work
- Prepares work assignment sheets, taking into consideration Resident safety, the educational preparation, experience, knowledge and ability of the persons to whom the assignments are made
- Receives calls and finds replacements for absent staff
- Transfers employees among units as needed
- Prepares performance evaluations with the understanding such evaluations impact tenure of probationary employees and wage increases of non-probationary employees
- Meaningfully rewards and disciplines employees with the understanding such discipline results in termination of employment through progressive steps
- Schedules and adjusts lunch and rest breaks
- Approves errors in time cards or other timekeeping records
- Authorizes overtime as necessary
- Receives and resolves employee complaints
- Determines rotation of employees within unit
- Monitors and corrects job performance of employees
- Is in charge of facility in absence of higher-ranking management officials
- Uses independent judgment and discretion on behalf of the organization in the performance of these duties

Among the duties enumerated in E Exh. 71 are:

- Takes job actions with staff members under appropriate circumstances. Independently applies facility policies about progressive discipline correctly. Removes staff member from unit if necessary to avoid endangerment to health or safety of residents or other staff members. Reports all job actions taken to Unit Manager promptly.
- Approves necessary adjustments in payroll documentation, including initialing errors and authorizing overtime as needed.

- Prepares probationary and annual evaluations of staff members. Where more than one unit charge nurse supervises a staff member, prepares evaluations jointly for purpose of recommending retention or termination, and determining merit wage increase.

Ratio

A finding that charge nurses are supervisors would have three interesting consequences. First, every nurse employed at the facility would be a supervisor, as there are no nurses on staff below the rank of charge nurse. Second, the supervisory ratio between aides and nurses would be almost one to one. (Tr. 652) Third, supervisors in the nursing department would outnumber non-supervisors by 50 to 45.

The Employer argues that such a ratio may be unusual in an industrial setting, but is preferred here, because nurse managers are not often on the unit floors (Tr. 1362-1363) and care of the frail and elderly requires meticulous attention. (E Brief, pp. 42-43)

Analysis

Assignments

In ***Oakwood Healthcare***, *supra* at 689, the Board clarified that the authority to assign under Section 2(11) means designating an employee to a place, such as a location, department, or wing; appointing an employee to a time, such as a shift or overtime period; or giving an employee significant overall duties. *Ad hoc* instruction to perform a discrete task is not assignment, ***Id.***, but may be, and is discussed here below in connection with, the function of responsible direction.

The Board instructs that proof of independent judgment is undercut by evidence that decisions are dictated or controlled by detailed instructions or established practices or policies. However, the existence of instructions or policies does not preclude a finding of independent judgment, if the policies allow for discretionary choices by the putative supervisor. In a healthcare setting, a nurse uses independent judgment in assigning when she weighs the individualized condition and needs of a patient against the skills or special training of the available staff. ***Barstow Community Hospital***, 352 NLRB 1052, 1053 (2008); ***Oakwood Healthcare***, *supra* at 693.

This record covers seven kinds of assignments. In three – assigning aides to patient units, work shifts, and on/off days – there is little or no evidence that charge nurses play any role at all. The scheduler, with the consent of the DON, determines those matters. I am unable to conclude that charge nurses possess authority in those areas.

In the other four – releasing aides early, finding replacements, scheduling overtime, and distributing patients and room sets – charge nurses have a role, but the record fails to establish that they participate using their independent judgment.

The scheduler decides how many, if any, aides to release early as a result of low patient census. Charge nurses implement the scheduler's decision by selecting the particular aides to send home, but the process is rote. By shop practice and the UAW contract, charge nurses choose from among volunteers in order of seniority, and rely on seniority if too few aides volunteer. These are the very factors that circumscribe a nurse's authority below the level required for finding independent judgment. *Oakwood Healthcare, supra* at 693.

DON Maddux testified that charge nurses influence decisions to retain aides otherwise scheduled to be released, and may make early-release decisions on the weekends in the absence of the PM manager. No specifics were adduced, not even claims of factors that the nurses allegedly would weigh. Asserting, without more, that a disputed individual assigns by taking patient acuity into account is too conclusionary to meet the required evidentiary threshold. *Loyalhanna Health Care Associates*, 352 NLRB 863, 864 (2008); *Lynwood Manor*, 350 NLRB 489, 490 (2007). Testifying in general terms that occasions exist, but omitting any details as to the charge nurses' precise roles or how they arrived at any judgments, wholly precludes a finding that their authority in such areas is exercised independently. *Loyalhanna Health Care, supra*.

Finding substitutes for absent aides falls primarily to acknowledged nurse managers, and secondarily to charge nurses serving as house supervisor. The latter hunt for replacements by tapping those listed on the 24 Hour Sheet, or finding volunteers by telephoning from a seniority roster. Neither method entails independent judgment. Even more significantly, no charge nurse may compel a solicited aide to stay past the end of a shift or come in from home. Although the UAW contract prescribes a mandation system, the record is silent on how, if at all, charge nurses are involved in it. The charge nurse's ability merely to request an aide to work does not constitute supervisory authority. *Golden Crest Healthcare, supra* at 729; *Heritage Hall*, 333 NLRB 458, 459 (2001); *Youville Health Care Center*, 326 NLRB 495, 496 (1998); *Providence Alaska Medical Center v. NLRB*, 121 F.3d 548, 552-553 (9th Cir. 1997).

The record as a whole does not establish that charge nurses independently assign overtime. A December 2008 memorandum forbids them to authorize it without the prior approval of higher managers. Three nurses provided evidence consistent with the memorandum, two telling of being admonished specifically for purporting to allow overtime on their own. The foregoing evidence outweighs the vague testimony of two other nurses, who claimed to possess the authority to approve overtime, but offered no details of how or when they were so invested or that they ever used it. Nor did the

Employer reconcile the nurses' claims with the plain language of the December 2008 memorandum.

The evidence that charge nurses assign significant overall duties to employees is slender at best. Charge nurses do not prepare the care kardexes and ADL sheets that tell aides what to do for each patient, or the daily assignment sheet that prescribes aides' general duties, such as wheelchair cleaning, on each shift.

Allocating patients to aides can theoretically constitute an assignment of overall duties. Here, however, there is virtually no evidence that charge nurses create sets of rooms to delegate to aides. Rather, aides themselves divide rooms into sets and trade sets at the start of each new biweekly pay period. When patients depart or request a different aide, it is usually the aides who reallocate the rooms to effect the required adjustments.

While conceding that aides frequently take the initiative for apportioning patients, nonetheless the Employer urges that charge nurses have a duty to review and, if necessary, modify those actions in the interest of patient care. The record shows negligible instances of such oversight. Three charge nurses testified either that they do not scrutinize how aides split the rooms, or, if they do, have never found a reason to make a change. One nurse explained that she devotes little attention to the process, because all aides on staff are capable of tending the patients. An aide said that on the one occasion that her co-workers failed to reach a consensus on how to distribute patients, they consulted with a clinical coordinator, not a charge nurse. Charge nurse Heidi Dozier's testimony that she makes adjustments once or twice per month was the only concrete evidence linking nurse review with assignment modification. The Board cautions against finding supervisory authority based only on infrequent instances of its existence. ***Family Healthcare, Inc.***, 354 NLRB No. 29, JD slip op. at 6-7 (June 4, 2009); ***Golden Crest Healthcare***, *supra* at 730 n.9. With so little evidence that nurses ever intervene, one is constrained to conclude that usually they merely ratify choices made by aides.

Even if one paves over the gap in the record on the threshold question of whether charge nurses assign or reassign patients to aides, there is no proof that such actions, to the extent they occur, require independent authority. The sparse evidence that nurses overrule how aides allocate rooms suggests that the process does not entail discretion, but is, rather, routine. On this record, the only specific time that a charge nurse rejected how aides divided rooms was when nurse Dozier vetoed an assignment to an orientee. Because Dozier's reaction was guided by the clinical coordinator and necessitated by Employer protocol, little independent judgment can be inferred. Accommodating patient or family requests, typically handled by aides rather than nurses, is historically viewed as routine as well.

DON Maddux alluded to the possibility of a charge nurse's choosing to assign an aide only one particularly "complicated" patient. The example was hypothetical. One

may surmise that a decision of that nature could conceivably stem from a nurse's professional assessments. But naked assertions that nurses take aides' skills and patients' conditions into account are not enough. *Barstow Community Hospital*, 352 NLRB at 1053 (Board discounts conflicting conclusionary statements as lacking in specificity). The Board demands actual proof, not speculation, as to the kinds of judgments a choice involves.

With regard to distributing patients and room sets, the evidence that charge nurses even make assignments is attenuated. The best evidence that charge nurses make assignments at all relates to their releasing aides early, finding replacements, and scheduling overtime. In none of those areas do they exercise independent judgment. At most, the charge nurses here are akin to *Oakwood Healthcare's* emergency room nurses, who made patient care assignments without taking patient acuity or staff skill into account, and ratified rotation of assignments with little input. Here, as in *Oakwood Healthcare*, the Employer failed to show that charge nurses' patient care assignments require a critical degree of discretion.

Responsible Direction

For direction to be responsible, the person directing must have oversight of another's work and be accountable for the other's performance. To establish accountability, it must be shown that the putative supervisor is empowered to take corrective action, and is at risk of adverse consequences for others' deficiencies. *Oakwood Healthcare*, *supra* at 691-692. As with all of the supervisory indicia enumerated in Section 2(11), responsible direction must entail independent judgment. For responsible direction to be exercised with independent judgment, it must (a) be independent, free of the control of others, (b) involve a judgment, that is, require forming an opinion or evaluation by discerning and comparing data, and (c) involve a degree of discretion that rises above the routine or clerical. *Oakwood Healthcare*, *supra* at 692-693.

At bar, patient records and written protocols instruct aides what to do for each patient, and an exhaustive procedures manual tells them how. Aides write their initials beside the ADL tasks as they complete them. Absent a change in a patient's condition, the aide knows what to do with little need for direction.

The Employer contends that patients experience significant declines and improvements that alter their course of treatment. Common sense suggests this is true. However, the record is devoid of illustrative examples of major changes, so it is unknown how they affect a charge nurse's thought processes and consequent direction to staff.

Instead, Employer witnesses alluded only to quotidian problems, such as readying a patient for visitors or an outside appointment, checking a catheter bag, taking a urine

specimen, cleaning teeth, and trimming nails. The Employer urges that charge nurses prioritize the order in which these familiar tasks are performed, and made at least a showing that this is so. Many charge nurses begin the aides' shifts by informing them of circumstances that will cause the aides to vary their routine. On some units, this standard report is relayed instead by direct communications among aides. The record establishes that charge nurses sometimes remind aides which tasks to accomplish, and may tell them to tackle a particular one quickly. The record is sufficient to conclude that such guidance by the nurse is mandatory for the aide.

However, the kind of *ad hoc* instruction on which the Employer relies is not necessarily supervisory. **Croft Metals**, *supra* at 722. Most of the evidence proffered by the Employer is conclusionary testimony from the DON, some clinical coordinators, and a few nurses about the types of directives that charge nurses give. The Employer lists them in its brief. (E Brief, p. 29) Reciting the many things that a nurse may call upon an aide to do is not proof that the nurse exercises independent judgment. To satisfy its burden to establish a sufficient quantum of discretion, an employer must present concrete evidence that explains how the nurse arrives at particular directives at particular moments – what factors she takes into account and how she weighs competing concerns.

The record contains only two specific examples in this area that even nod toward the needed evidentiary standard. In one, nurse O'Rourke said that she would direct an aide to dry and re-dress a wet patient, if the aide was not already so occupied. In the other, nurse Dozier said that she instructed an aide to help a new one shower a difficult patient, after the new aide expressed doubts about her ability to perform certain jobs on her own. Dozier's example was an actual event, while O'Rourke's was a general illustration. In a lengthy hearing concerning a 43-nurse unit, it is remarkable that the pins supporting independent judgment are so slender. In addressing this issue in its brief, the Employer cites the Dozier shower matter as "but one example" of how charge nurses assess aide skills and resident needs. (E Brief, p. 30) The brief cites no others, and the record reveals, at most, only the one more.

Further, although the situations that O'Rourke postulated, and Dozier faced, would require a modicum of judgment, neither scenario convinces. Independent judgment that rises above the routine, clerical, or perfunctory involves forming an opinion through analyzing data. **Oakwood Healthcare**, *supra* at 693; **Bowne of Houston**, 280 NLRB 1222, 1223 (1986). Telling an aide to tend a soiled patient immediately, provided the aide is not already so occupied, does not plumb depths of discretion. Accommodating a professedly insecure aide's request for assistance is prudent, but does not imply a considered comparison of employees' relative skills. See **Shaw, Inc.**, 350 NLRB 354, 357 n.13 (2007). In sum, the Employer has not met its burden to show that *ad hoc* instruction given by charge nurses to aides requires independent judgment. **Croft Metals**, *supra* at 722.

The showing with respect to aides' work breaks is similarly deficient. The UAW contract spells out the amount of break time allotted per shift, and makes timing a management prerogative. It is clear that aides must notify charge nurses before leaving the unit, but far from certain that nurses exercise much control. Aides schedule breaks largely on their own. There is reference to only one occasion that a nurse ever forbade an aide to take a break, and no details were supplied about that event to illuminate what factors the nurse, Corin Greene, took into consideration. The Employer argues, from conclusionary testimony, that nurses must assess patient needs before allowing aides to leave, but the record does not support the conclusion with any examples. The seven-year-old verbal warning administered to nurse Heather Ouellette for, *inter alia*, allowing three aides to take breaks simultaneously is not cogent proof of charge nurse discretion in this area, as it is isolated, stale, and does not establish what exactly constituted Ouellette's error. Nurse Janette Reau once recalled an aide from a break to deal with a soiled patient, but we know no other details, such as who else was working on the unit and what predicaments they might have faced. It is impossible to determine whether Reau's action was truly discretionary or the only available option. *Shaw, Inc.*, *supra* at 357 n.13 (calling on readily available employee to perform necessary mundane chore, simply to get it done, is not indicative of independent judgment).

How often charge nurses respond to aides' requests to leave early was not quantified. The Union presented evidence from two nurses and one aide that nurses typically refer such questions to upper managers. The fact that nursing managers are physically on site an overwhelming majority of the time, and telephonically reachable at all others, makes such referral both plausible and easy.

The Employer presented six instances of charge nurses making the decision on their own. Per a long-standing Employer policy, Theisen and O'Rourke released sick aides. Dozier let a laundry employee go due to a death in the employee's family. Theisen chose to let an aide go home to prevent the police from appearing at the Employer's facility. Reau allowed an aide a brief hiatus to pick up her children during a work lull. Greene permitted an aide to leave early under unknown circumstances. The record gives no clue as to what percentage of early-departure requests these six occasions represent.

There is evidence that, at a meeting attended by only 10 or 12 nurses out of a bargaining unit of 43, DON Maddux gave charge nurses the right to grant aides' early-leave requests for "good cause." Only one nurse present so testified. That the record contains but six instances of unilateral nurse action, primarily reflecting reactions to illness, family crises, and police emergencies, suggests that the authority allegedly bestowed upon the 10 or 12 nurses has not been disseminated widely, and has not been interpreted as a grant of expansive discretion.

The Employer asserts that charge nurses direct non-nursing staff. There are two bases of support. First, a charge nurse once reported an error committed by a dietary employee, an action that a nurse aide would be expected to take as well. Second, work orders submitted by nurses allegedly can affect the order in which maintenance workers undertake jobs, a supposition never proved. This evidence is too thin to establish that nurses direct employees in other departments, let alone that they use independent judgment in doing so.

The analysis of all of the foregoing must be leavened by an examination of whether charge nurses direct responsibly – that is, are (i) entitled to take corrective steps, and (ii) face a prospect of adverse consequences for the conduct of others. Both elements must be demonstrated. The Employer established the former, but not the latter.

The weight of evidence undermines protestations from some nurses that they were never advised to monitor or oversee aides. Even former employee Holly Cranford, who said she refrained from looking for errors, admitted that she would report and correct any she discovered. Educating aides in the interest of patient care is within the scope of any nurse's practice, and the Employer's charge nurses demonstrably discharge the function. I find that whether they choose to give advice orally, or issue written in-services, charge nurses are empowered to, and do, correct aides' work.

But the authority to correct improper performance is not, in itself, supervisory. *Croft Metals, supra* at 722 & n.13. To establish responsible direction, charge nurses must risk a real prospect of adverse action for aides' poor performance; the evidence is insufficient.

First, the record is inconclusive on whether the Employer has informed nurses that they bear such a risk. PM Austermiller conceded that she never told nurses they might be disciplined for misconduct of their aides. Clinical Coordinator Nutt recited pat phrases about accountability, but could not recall telling nurses that they are accountable for anything specific beyond seeing that call lights are answered and weights are obtained, tasks that nurses and aides share. Neither of the two charge nurse job descriptions warns that nurses are imperiled in any way for the misdeed of aides. I am unable to assume that nurses have been so advised.

Second, the corrective actions of nurses on which the Employer relies are unpersuasive. Only three of the six documents in the record are disciplinary notices. The other three are in-services, which are outside the progressive disciplinary system for nurses as well as for aides, and have no demonstrated impact on nurses' terms and conditions of employment.

Even more importantly, the six corrections did not hold the nurses responsible for the conduct of aides, but, rather, for improperly discharging the nurses' own duties.

Peggy Mayner and Amanda Jordan failed to document patient weights; Shannon Leveque neglected to document and prepare several matters for a newly admitted patient; Jennifer Carver did not complete monitor sheets; Corin Greene did not promptly answer call lights; and Heather Ouellette inadequately oversaw her aides. This evidence shows that nurses are accountable for their own performance or lack thereof, not that of aides. That does not establish responsible direction. ***Oakwood Healthcare***, *supra* at 695.

Third, although evaluations of charge nurses contain general comments on their skills as leaders, there is no evidence that any nurse has been downgraded in an evaluation based on aide conduct. Even if any nurse were, the reduced rating could not be viewed as an adverse consequence, in the absence of evidence that evaluations affect pay, promotion, or any other term and condition of nurses' employment. As the Board said in ***Golden Crest Healthcare***, *supra* at 731, accountability under ***Oakwood Healthcare*** requires only a prospect of consequences, but there must be more than a paper showing that such a prospect exists. That an aide's deficiency may somehow reflect poorly on a nurse in her evaluation, in an unspecified and non-material way, does not constitute the requisite evidence of actual accountability. ***Rockspring Development, Inc.***, 353 NLRB No. 105, slip op. at 2 (Feb. 27, 2009); ***Golden Crest Healthcare***, *supra*.

Fourth, the case for accountability is irredeemably undercut by the evidence that no charge nurse received any adverse consequence whatsoever for the many aide errors, some of them egregious, documented in the record. When asked about this, DON Maddux's answer was that the charge nurses over the errant aides had been blameless. Her response is dispositive proof that the Employer does not hold nurses accountable. The requisite showing of accountability or adverse consequences is not present where the putative supervisor is disciplined for his or her own inadequate performance. Rather, it is present only when the putative supervisor satisfactorily performed his or her own duties, but nonetheless is disciplined because underlings failed to perform their tasks properly. For example, lead persons in a manufacturing setting were held accountable where they received written warnings because their crews did not meet production goals. ***Croft Metals***, *supra* at 722. In contrast, when a charge nurse was disciplined for failing to make fair assignments, she was held accountable only for her own performance and not that of other employees. ***Oakwood Healthcare***, *supra* at 695.

To summarize, the Employer has not adduced specific evidence that nurses may be disciplined, receive a materially meaningful poor performance rating, or suffer any adverse consequences with respect to their terms and conditions of employment due to a failure in an aide's performance. Nor is it convincingly shown that the Employer has warned them that they face a prospect of adverse action. As a result, it has not been demonstrated that charge nurses are held accountable for those they direct. I find, therefore, that charge nurses do not possess the authority responsibly to direct. ***Lynwood Manor***, *supra* at 491; ***Golden Crest Healthcare***, *supra* at 731.

Transfers

Temporary transfers of aides restore staffing levels to those prescribed by the scheduler. Most are accomplished by either the charge nurses or the aides themselves, using a float sheet that equalizes the number of times aides are pulled. The float sheet renders the choice a routine one that does not require a sufficient degree of independent authority.

On two occasions – and only two, as far as the record reveals – charge nurses who were required to forfeit an aide departed from the float sheet and retained their more experienced ones. The record does not clarify whether the nurses simply retained their more senior aides, thus making their choices more routine than evaluative. Assuming that the nurses displayed true discretion, these two instances, particularly in a nurse unit of this size, are too infrequent to justify a supervisory finding. *Family Healthcare, supra* (scattered instances over nine years); *Shaw, Inc., supra* at 357 n.21 (one instance yielding two suspensions); *Golden Crest Healthcare, supra* at 730 n.9; *Robert Greenspan, D.D.S., P.C.*, 318 NLRB 70 (1995), *enfd.* 101 F.3d 107 (2nd Cir. 1996) (unpublished), *cert. denied* 519 U.S. 817 (1996) (four instances).

The Employer claimed that charge nurses influence permanent transfers, but the sole example adduced failed to show what role the nurse, Denise Lisek, played.

I am unable to conclude that the Employer has met its burden to show that charge nurses transfer, or effectively recommend the same, using independent judgment.

Discipline – Suspension – Discharge

The Employer contends that in-services constitute discipline for purposes of Section 2(11). It also maintains that charge nurses make effective recommendations leading to discipline under the Employer's progressive disciplinary system. I demur on both counts.

I agree with the Employer that charge nurses initiate and issue in-services on their own. However, the record does not establish that those corrective actions are disciplinary.

First, in-services are not part of the Employer's progressive disciplinary system. That system begins, instead, with a verbal warning, a concededly different action that, unlike an in-service, is grievable and constitutes the first disciplinary step under not only the Employer's handbook, but also the aides' and nurses' collective-bargaining agreements. The exclusion of UAW representatives from meetings at which aides receive in-services underscores that in-services are perceived and treated as educational, rather than disciplinary.

Second, the record does not show that an in-service necessarily leads to discipline for a subsequent like offense. There is evidence from nurse Holly Cranford that the DON explicitly dispelled such a connection. UAW steward Tiki Morris successfully prevented management from relying on prior in-services to discipline an aide. An aide was in-serviced for an infraction, and then in-serviced for the same infraction two months later. The older of the two in-service forms, which is still in use as far as the record reveals, explicitly states that it will not be filed in an aide's personnel records unless nursing management so chooses after review and investigation.

If an in-service inevitably leads to discipline for the next similar offense, one would expect the Employer to show at least one concrete example of that precise progression. It offered none. Instead, it adduced only generalizations by DON Maddux and unsupported assertions in post-hearing argument. (E Brief, pp. 23-25) Although the record contains series of in-services and disciplines with regard to certain aides, there is no evidence or stipulation that any series includes all of the in-services issued to the aide. Consequently, one may not infer the pattern that the Employer urges. DON Maddux called the in-service an aide's "get-out-of-jail-free card," but this record does not establish that recidivism is guaranteed to lead to incarceration. An in-service appears, rather, to be an important but non-disciplinary educational tool, exactly as DON Maddux described it to many witnesses.

The Employer takes the contrary view, citing *Promedica Health Systems, Inc.*, 343 NLRB 1351 (2004), enfd. in relevant part 206 Fed. Appx. 405 (6th Cir. 2006) (unpublished), cert. denied 549 U.S. 1338 (2007), and *Oak Park Nursing Care Center*, 351 NLRB 27 (2007). (E Brief, pp. 24-25) Each is distinguishable. *Promedica* is an unfair labor practice case not applying Section 2(11). The coaching there was an express part of the respondent's progressive disciplinary system, unlike the in-services at bar. In *Promedica*, respondent proved that coachings lay a foundation for future disciplinary actions, in that they were "duly considered when future discipline [was] contemplated." *Id.* at 1351-1352. Here, there is no actual proof that in-services play the same role. In *Oak Park Nursing*, a representation case, the Board found disciplinary authority based on counseling forms that were an "integral part of the Employer's progressive disciplinary system in that they...routinely result in actual discipline." *Id.* at 28-29. Neither dispositive characteristic is proven here.

Other cases are more on point. In *Lancaster Fairfield Community Hospital*, 311 NLRB 401, 403-404 (1993), the Board found a conference report not to be discipline, because it was not part of the formal disciplinary procedure, nor shown to be a preliminary step in the progressive disciplinary scheme. Instead, it merely warned the employee of potential performance or behavior problems. This aptly describes the in-services here. In *Vencor Hospital – Los Angeles*, 328 NLRB 1136 (1999), the Board reached the same result on the absence of evidence as to how the personnel action in

question affected employees' job status or tenure. The same evidentiary lacuna exists in the instant case.

The Employer has not satisfied its burden to show that in-services affect aides' employment status. Consequently, the authority to issue them does not confer supervisory status upon charge nurses. *Shaw, Inc.*, *supra* at 357 n.13; *Heritage Hall*, 333 NLRB 458, 460 (2001).

Charge nurses are prohibited by the UAW contract from issuing disciplinary actions. The Employer attempts to get mileage from one *ultra vires* verbal warning that nurse Nicole Thompson signed against an aide. (E Brief, p. 22) This singular event that contravened the Employer's labor agreement is not a proper footing for supervisory disciplinary power. Likewise, disciplinary authority is not proven by the lone time that a nurse ejected flagrantly misbehaving agency aides. Not only is a mere single instance unpersuasive, *Heritage Hall*, *ibid.*, but sending an employee home for gross misconduct has never been viewed as proof of supervisory authority, because a limited response to an obvious violation requires no independent judgment. *Lincoln Park Nursing Home*, 318 NLRB 1160 (1995); *Manor West, Inc.*, 313 NLRB 956 (1994); *Loffland Bros. Co.*, 243 NLRB 74, 75 n.4 (1979).

The Employer argues that charge nurses have the authority effectively to recommend discipline. To prevail, the Employer must prove that: (i) nurses submit actual recommendations, and not merely anecdotal reports, (ii) their recommendations are followed on a regular basis, (iii) the triggering disciplinary incidents are not independently investigated by superiors, and (iv) the recommendations result from the nurses' own independent judgment. *Ten Broeck Commons*, 320 NLRB 806, 813 (1996) (reportorial function is not supervisory); *The Ohio Masonic Home, Inc.*, 295 NLRB 390, 394 (1989) (same); *ITT Lighting Fixtures*, 265 NLRB 1480, 1481 (1982), *enf. denied* on other grounds 712 F.2d 40 (2nd Cir. 1983), *cert. denied* 466 U.S. 978 (1984) (to be effective, a recommendation must be both followed and *not* independently investigated).

Contrary to the implication in the Employer's brief (p. 28), showing that recommendations are usually or even always followed is not enough. The party alleging supervisory status must also show that the recommended action is taken with *no* independent investigation by upper management. *Family Healthcare*, *supra*, slip op. at 5; *American Directional Boring, Inc.*, 353 NLRB No. 21, JD slip op. at 42, 46-47 (Sept. 30, 2008).

I find the evidence unconvincing as to factors (i), (iii), and (iv).

The record does not contain even one written disciplinary recommendation from any nurse. Most of what Employer witnesses mischaracterized as recommendations were nothing more than reportorial accounts that made factual allegations, but did not urge any

disciplinary consequence. The Board has repeatedly held, with court approval, that a mere reportorial function is not sufficient to support a supervisory finding. *Hillhaven Rehabilitation Center*, 325 NLRB 202, 203 (1997); *Northwest Nursing Home*, 313 NLRB 491, 497-498 (1993); *Waverly-Cedar Falls Health Care Center, Inc. v. NLRB*, 933 F.3d 626, 630 (8th Cir. 1991); *NLRB v. City Yellow Cab Co.*, 344 F.2d 575, 580-581 (6th Cir. 1965). The principle is still standing in the post-*Oakwood* landscape.

Despite the paper authority ascribed to nurses in their job descriptions, discussed below, the record overall raises doubt that the authority to recommend discipline truly exists. Charge nurses are barely on the margins of the disciplinary process. Several nurse witnesses testified that they were never informed they had the authority to recommend discipline. Nurses have never received formal training regarding discipline. They have no access to personnel files, and therefore cannot recommend specific levels of discipline. They are not included in upper management's investigations of misconduct, except when they are interviewed as witnesses. There is no showing that they are routinely informed when aides receive discipline. Even when they submit anecdotal reports, there is no regular mechanism, as far as the record reveals, to advise them of the outcome. The UAW contract prohibits them from presenting disciplinary notices, but the Employer goes further and chooses not to invite them to attend meetings where aides are disciplined. On this record, a charge nurse attends only if she makes an individual request and obtains special permission.

Even assuming that all of the asserted oral recommendations were actually made, they are attributed to only about 4 nurses in a 43-nurse bargaining unit. More than one-half of the recommendations by those four came from a single nurse, Elizabeth O'Rourke. It should also be noted that the record does not disclose the total number of aide disciplines within any given time period, thus preventing a computation of the percentage of times that charge nurses figure in the process at all. It is true that supervisory status is established by the possession, not exercise, of authority. Yet these statistics suggest that disciplinary recommendations by charge nurses are the anomaly, not the rule, and support a conclusion that the Employer has never systematically informed nurses of a power to recommend.

There is testimony of some oral recommendations, but none of the situations carries the day for the Employer. In each case, the recommendation was either not effective, because upper management conducted its own investigation, or not an exercise of independent judgment, because the nurse's reaction was a wholly understandable and routine response to flagrant misconduct:

E Exh. 18 Nurses O'Rourke and Greene orally recommended discipline for an aide's gross misconduct of leaving patients saturated in body wastes. Clinical Coordinator Nutt investigated the matter before issuing the aide a three-day suspension dated September 30, 2008.

E Exh. 23 DON Maddux testified that nurses O'Rourke, Dozier, and Greene recommended that the same aide be discharged in September or October 2008. None of the nurses corroborated her. Whatever recommendations the DON may have believed she heard, she ignored them until December 2008, when she finally discharged the aide, after two intervening suspensions and a separate pre-discharge investigation conducted by the DON and Clinical Coordinator Nutt.

E Exh. 20 A probationary aide was discharged May 19, 2009, following nurse O'Rourke's oral recommendation that she be terminated for gross neglect. Before administering the discharge, Clinical Coordinator Nutt interviewed another aide to ascertain whose job it had been to feed the neglected patient, and also interviewed the aide in question. The reason for the termination was termed patient abuse and neglect, a label that triggers an Employer duty to investigate and report to the State.

E Exhs. 24-25 Nurse O'Rourke orally recommended that an aide be discharged for what she deemed his shocking behavior of ignoring a urine-soaked patient for eight hours, thus causing skin breakdown, and claiming to have forgotten the patient was assigned to him. DON Maddux and Clinical Coordinator Greening interviewed the aide about the matter in the presence of his UAW representative, and later terminated him on July 16, 2008.

E Exh. 36 Nurse O'Rourke orally recommended discipline of an aide for leaving her patient wet and then lying about it. The aide eventually received a written warning dated September 18, 2008, but only after both ADON Wyatt and DON Maddux questioned her in separate sessions.

U Exh. 9 Within two weeks of the aide's written warning above, she reportedly committed the identical misconduct again. No nurse made an explicit recommendation to discipline. Although nurse O'Rourke told Clinical Coordinator Nutt that she did not feel the aide was able to give proper patient care, there is no evidence that the remark was treated as a recommendation or entered into Nutt's decision-making. Rather, because the aide had just received a written warning for the same infraction, Nutt reflexively followed the progressive disciplinary steps and issued a three-day suspension.

E Exh. 60 Nurse Reau recommended that a probationary aide be discharged for ignoring a patient, a problem brought to Reau's attention by the patient's family. Clinical Coordinator Greening relied on Reau's report, not her recommendation, and inspected the patient herself before deciding that discharge was appropriate. The aide was terminated December 29, 2008.

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In all of the following situations, the Employer failed to establish sufficient evidence that any recommendation was made at all. In some cases, the record is too

equivocal to permit a finding that a nurse made an oral disciplinary recommendation. In others, there is evidence only of purely anecdotal reports. The reports did not constitute effective recommendations, because the ultimate disciplinary actions took place only after upper managers reviewed the reports, and, often, independently investigated as well.

E Exh. 38 DON Maddux testified that nurse O'Rourke recommended to her and Clinical Coordinator Nutt that an aide be discharged. Neither Nutt nor O'Rourke corroborated her. In fact, the DON later contradicted herself, admitting that she and O'Rourke did not discuss the discharge incident until after the aide was terminated on October 3, 2008. She decided to terminate the aide after reviewing the observational reports and considering her advanced place on the disciplinary ladder.

E Exh. 55 Clinical Coordinator Nutt claimed that nurse Greene recommended that an aide be disciplined for inadequate patient care. Greene did not support the testimony. At any rate, Nutt conducted an investigation of the incident, including interviewing Greene as a witness, before issuing a verbal warning on October 24, 2008.

E Exh. 17 An aide received a three-day suspension dated November 24, 2008. Nurse Theisen made an anecdotal report, not a recommendation to discipline. Clinical Coordinator Nutt suspended the aide only after conducting her own investigation.

E Exh. 19 Before terminating an aide on May 6, 2009, Clinical Coordinator Greening rescinded three in-services issued by charge nurses and took various other steps to salvage the aide's job. There is no evidence that Greening received or honored any nurse's disciplinary recommendation in the matter.

E Exh. 51 A dietary manager suspended a dietary aide on December 12, 2008, after receiving a factual report, not a disciplinary recommendation, from nurse Lisek.

U Exh. 11 Anecdotal misconduct reports from nurse O'Rourke and the admissions director prompted an investigation by DON Maddux, leading to the termination of an aide on February 16, 2009.

E Exh. 31 There is no evidence that nurses O'Rourke or Jukuri recommended that the aide be discharged for insubordination, as DON Maddux testified. The August 11, 2008, termination occurred only after Clinical Coordinator Nutt conducted an investigation, which included her ghost-writing witness statements signed by O'Rourke and Jukuri.

E Exh. 53 Alerted to a probationary aide's performance problems by in-services issued by nurses Ferguson and O'Rourke, DON Maddux and Clinical Coordinator Nutt jointly questioned him. Based on the interview, Nutt decided not to take disciplinary action, but rather to assign him a new training mentor. When that

remedial step proved futile, Nutt discharged him April 27, 2009. There is no evidence that any charge nurse recommended discipline.

E Exh. 45 DON Maddux decided to discharge a probationary aide on July 3, 2008, after reviewing and considering nurse Cranford's report that the aide left early and slept on the job.

E Exhs. 41, 43, 44 DON Maddux reviewed not only the underlying anecdotal reports, but also the June 20, 2008, warning to an aide, and decided, *sua sponte*, to reduce the warning from written to verbal. Both the DON and ADON Wyatt reviewed accounts from nurses before issuing the aide's written warning on October 6, 2008, and a suspension later the same month.

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Neither of the final two disciplinary matters in the record advances the Employer's cause:

E Exh. 22 Nurse O'Rourke's report of a disagreement with an aide put the aide in harm's way of discipline. Once O'Rourke was mollified by the aide's apology, she urged leniency. DON Maddux decided to commute a warning drafted by Clinical Coordinator Nutt to a counseling.

E Exh. 28 Nurse Greene in-serviced an aide for insubordination, and recommended discipline as well. Either DON Maddux or Clinical Coordinator Nutt vetoed the recommendation.

In regard to E Exh. 22, supervisory status under Section 2(11) contemplates the exercise of a more generalized authority than the pursuit and resolution of interpersonal conflicts. With regard to E Exh. 28, Greene's recommendation was plainly ineffective.

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The Employer has not met its burden with regard to discipline, suspension, or discharge. In-services are not discipline, so the charge nurses' role with regard to them does not confer supervisory authority. The evidence that nurses suspend employees is sparse and does not establish independent judgment. The record as a whole, including the marginality of the charge nurses' disciplinary role and the infrequent and isolated pattern of recommendations, creates fatal disquiet that charge nurses possess actual authority to recommend discipline. Each purported recommendation falls short, either because (i) no disciplinary recommendation was actually made, (ii) it was not effective as the Board defines that term, or (iii) it involved such gross misconduct that the nurse's response did not require independent judgment.

Hiring

Charge nurses do not determine when to hire employees, nor do they make final hiring decisions. The Employer rests its case that they make effective hiring recommendations on evidence that a few nurses interviewed aide candidates when nurse managers were busy. The scant record evidence does not establish supervisory status on that basis.

First, there is no evidence that charge nurses make recommendations unless they interview the candidate, and the percentage of aides interviewed by charge nurses is insignificant. DON Maddux suggested that some charge nurses have served as the sole interviewers, but her testimony lacked sufficient details as to names, dates, and numbers, and was therefore unreliably vague.

Second, on the small number of times that a charge nurse was the sole interviewer, it is unknown how much independent evaluation was conducted by the final arbiter. Thus, there is no specific evidence on how the nurse's opinion may have factored into the decision. Screening candidates and rendering opinions on technical qualifications do not impart supervisory authority to recommend. *J. C. Penney Corp.*, 347 NLRB 127, 129 (2006); *The Door*, *supra* at 601-602.

Third, not all of the few nurses who conducted interviews even made recommendations. Corin Greene made none. Jennifer Carver reported only on the candidate's level of training. The record is inconclusive as to whether Elizabeth O'Rourke offered any opinion on three of her interviewees.

Fourth, the recommendations of those who rendered them were not necessarily effective. Stephanie Ouellette offered a positive comment, but the applicant was not hired. O'Rourke recommended one aide who withdrew from the pool at an undisclosed point. Only Angela Theisen made a recommendation that led to a consistent result, but there is scant evidence as to how Theisen's remarks figured in the ultimate decision.

The Union, citing *Robert Greenspan, D.D.S., P.C.*, *supra*, argues that I may not rely on the charge nurses' involvement in interviews, because it is alleged as an unfair labor practice in a pending case. In *Greenspan*, the Board mentioned that two instances of asserted supervisory authority took place before an illegal withdrawal of recognition, and two occurred after. The Board discounted all four instances as too sporadic. *Greenspan*, an unfair labor practice case, has not been cited since for the blanket proposition that an *alleged* but not adjudicated unfair labor practice is barred from consideration as supervisory evidence in a representation proceeding.

Instead, I rely on *Greenspan* and similar cases to find, simply, that the evidence of charge nurse authority to hire, or recommend the same, is too sketchy and infrequent to satisfy the Employer's burden.

Promotion

Evidence regarding promotions is similarly incomplete. For the reasons asserted above, see pages 47-53, specifically the discussions regarding probationary aides, the Employer has not established that the charge nurses effectively recommend retention of probationary employees. The record has but one example that a charge nurse's opinion was solicited with respect to granting an aide's request for full-time status. How that opinion affected the final decision was not explored. The Employer has failed to meet its burden.

Reward – Compensation

Charge nurses do not possess any authority with respect to aides' rates of pay, fringe benefits, or other compensation matters. While aides are not eligible for merit raises, their collective-bargaining agreement refers to the possibility that pay increases may be granted to keep step with the market. There is no evidence, however, that charge nurses play any role in granting or influencing such increases.

Nurses do not regularly evaluate employees, nor is their input regularly solicited. Select nurses, clear exceptions to the normal practice, have completed aide evaluations, but there is no showing that evaluations affect aides' terms and conditions of employment. Because evaluating is not an express indicium under Section 2(11), the Board declines to find supervisory status unless there is evidence, absent here, that evaluations constitute effective recommendations to reward, promote, discipline, or otherwise affect the evaluated employee's job. *Croft Metals*, *supra* at 720; *Custom Mattress Mfg.*, 327 NLRB 111 (1998).

Resolving Grievances

Charge nurses do not play any role in the aides' contractual grievance procedure. The record is too insubstantial to conclude that they meaningfully resolve aides' pre-grievance disputes. The Employer adduced one purported example, in which an offended nurse accepted an aide's apology and thereafter successfully pleaded for mitigation. In one example ostensibly showing the opposite, however, a midnight shift nurse deferred to upper management to settle a problem raised by a suspended aide's union steward. There is no showing that charge nurses resolve disputes for non-nursing employees. I cannot find, on this record, that charge nurses independently resolve grievances within the meaning of Section 2(11).

Secondary Indicia

It is well established that where, as here, putative supervisors are not shown to possess any of the primary supervisory indicia, secondary indicia are insufficient to establish supervisory status. ***Golden Crest Healthcare***, *supra* at 730 n.10; ***Ken-Crest Services***, 335 NLRB 777, 779 (2001).

Written job descriptions for the charge nurses suggest the presence of supervisory authority. Indeed, one description seems to have been consciously drafted to mirror the Board's shibboleths. But the expansive power set forth in the documents is at odds with the realities. The Board has long cautioned that evidence of actual authority trumps mere paper authority. ***Avante at Wilson***, *supra* at 1057; ***Golden Crest Healthcare***, *supra* at 731; ***Valley Slurry Seal Co.***, 343 NLRB 233, 246 (2004); ***Franklin Home Health Agency***, 337 NLRB 826, 829 (2002); ***Training School at Vineland***, 332 NLRB 1412, 1416 (2000); ***Chevron U.S.A., Inc.***, 309 NLRB 59, 69 (1992). I conclude that the charge nurses' written job descriptions are mere paper conveyances that do not impart actual supervisory authority.

The Employer adverts to the nurses' higher pay. This factor is of little utility, particularly in view of the countervailing evidence that their pay is appreciably less than that of acknowledged managers. The Employer mentions their attendance at monthly nurse meetings, but omits the evidence that they are excluded from daily meetings attended by nurse managers.

It is true, as the Employer argues, that charge nurses spend far more time on unit floors than do admitted supervisors. However, it is also true that for the largest proportion of every nurse's shift, a manager is physically on site, and at all other times, managers are on call. At any rate, nothing in the Act suggests that service as the highest-ranking worker in a geographical area requires a supervisory finding. ***Training School at Vineland***, *supra* at n.3. This is viewed as especially true in nursing home settings. ***Beverly Manor Convalescent Centers***, 275 NLRB 943, 947 (1985); ***NLRB v. Hillview Health Care Center***, 705 F.2d 1461, 1467 (7th Cir. 1983).

If charge nurses are supervisors, the Employer would employ no non-supervisory nurses, and the ratio between charge nurses and aides would be one to one. Even more striking, the number of supervisors within the nursing department – counting 43 charge nurses and the 7 managers over them – would be 50, thus exceeding the 45 non-supervisory aides. These are unusual results. However, I do not quarrel with the Employer's implicit argument that it, and not the Government, should determine the appropriate supervisory ratio. Therefore, these consequences of a supervisory finding are mentioned only to respond to the parties' competing arguments. I find that charge nurses are employees based on the totality of the evidence as to the Act's primary indicia.

Conclusion

Based on the above, **IT IS ORDERED** that the Employer's amended petition to clarify the bargaining unit by excluding charge nurses and house supervisors is denied.

Dated at Detroit, Michigan, this 30th day of April 2010.

(SEAL)

/s/ Stephen M. Glasser

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RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.69 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the **Executive Secretary, 1099 14th Street, N.W., Washington, DC 20570-0001**. This request must be received by the Board in Washington by **May 14, 2010**. The request may be filed electronically through **E-Gov** on the Board's website, **www.nlrb.gov**,⁶ but may **not** be filed by facsimile.

⁶ Electronically filing a request for review is similar to the process described above for electronically filing the eligibility list, except that on the E-Filing page the user should select the option to file documents with the **Board/Office of the Executive Secretary**.

To file the request for review electronically, go to **www.nlrb.gov** and select the **E-Gov** tab. Then click on the **E-Filing** link on the menu. When the E-File page opens, go to the heading **Board/Office of the Executive Secretary** and click on the **File Documents** button under that heading. A page then appears describing the E-Filing terms. At the bottom of this page, the user must check the box next to the statement indicating that the user has read and accepts the E-Filing terms and then click the **Accept** button. Then complete the E-Filing form, attach the document containing the request for review, and click the **Submit Form** button. Guidance for E-Filing is contained in the attachment supplied with the Regional Office's initial correspondence on this matter and is also located under **E-Gov** on the Board's web site, **www.nlrb.gov**.